90-1258

Supreme Court, U.S.
FILED
FEB 4 1991
OFFICE OF THE CLERK

No. _____

In the SUPREME COURT of the UNITED STATES

October Term 1990

SUSAN J. FASSE and ELIZABETH FASSE,
PETITIONERS.

v.

PATRICIA HODGSON, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE STATE OF GEORGIA SUPREME COURT

APPENDIX

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TABLE OF CONTENTS
PETITIONERS-APPELLANTS' APPENDIX

PETITION FOR WRIT OF CERTIORARI

1. Nov. 7, 1990 final judgment appealed from. Georgia Supreme Court's order denying appellants' timely Petition for rehearing.....1

2. Oct. 17, 1990 judgment of Georgia Supreme Court affirming judgment against appellants without opinion.....2

3. Nov. 14, 1990 Order of Georgia Supreme granting to appellants a stay of remittitur order (pursuant to its Rule 61) to appeal to United States Supreme Court.....3

4. Appellant Susan Fasse's Enumeration of Errors to Georgia Supreme Court.....6

5. Appellant Elizabeth Fasse's Enumeration of Errors to Georgia Supreme Court.....41

6. Oct. 26, 1990 Appellants timely Motion For Reconsideration\Petition For Rehearing to the Georgia Supreme Court.....52

7. Order of Georgia Supreme Court granting to appellant Susan Fasse her application for discretionary appeal from the Superior Court (Atlanta) of Fulton County, Georgia.....100

8. Order of Georgia Supreme Court granting to appellant Elizabeth Fasse her application for discretionary appeal from the Superior Court (Atlanta) of Fulton County, Georgia.....102

9. Petition For Discretionary Appeal of appellant Susan Fasse to the Georgia Supreme Court from final offensive judgment of the Superior Court (Atlanta) of Fulton County, Georgia.....104

10. Petition For Discretionary Appeal of appellant Elizabeth Fasse to the Georgia Supreme Court from final offensive judgment of the Superior Court (Atlanta) of Fulton County, Georgia.....109

11. Sept. 26, 1989 order of the Superior Court (Atlanta) of Fulton County, Georgia denying appellant Elizabeth Fasse's Motion To Set Aside Judgment.....114

12. Appellant Elizabeth Fasse's Motion To Set Aside offensive judgment as to her entered by the Superior Court (Atlanta) of Fulton County, Georgia of June 6, 1988, which judgment was prior to the amendatory act of 28 USC sec. 1257 *[effective: Sept. 25, 1988. SEE: sec. 7 of the United States Supreme Court Case Selection Act.]*.....115

13. Fulton County, Superior Court (Atlanta Judicial Circuit, Georgia) Local Compulsory, Non-Binding Arbitration Rule 1000, paragraphs [sections] 13, 14, 15 & 16.....117

14. Oct. 2, 1986 Fulton County, Superior Court [nisi prius] (Atlanta Judicial Circuit, Georgia) Order of Consolidation of all of appellants Elizabeth Fasse's and Susan Fasse's pending cases in the trial court.....121

15. Aug. 28, 1989 order of the Superior Court (Atlanta) of Fulton County, Georgia denying appellant Susan Fasse's Motion To Set Aside Judgment.....123

16. Appellant Susan Fasse's Motion To Set Aside offensive judgment as to her entered by the Superior Court (Atlanta) of Fulton County, Georgia.....124

17. Oct. 13, 1988 appellant Susan Fasse's Motion For Continuance of Arbitration and Civil Litigations with exhibits.....140

18. Oct. 20, 1988 order of the Superior Court (Atlanta) of Fulton County, Georgia granting appellant Susan Fasse's Motion For Continuance...145

19. Jan. 31, 1989 appellant Susan Fasse's Motion For Continuance of Arbitration and Civil Litigations with exhibits.....147

20. Affidavit of appellant Susan Fasse dated August 1, 1989.....156

21. Affidavit of attorney Robert A. Meier IV dated July 21, 1989.....159

22. Affidavit of attorney Thomas V. Cassidy dated August 1, 1989.....161

23. Affidavit of Kimberly A. Worden, Arbitration Administrator of the Office of Civil Arbitration, Fulton County Superior Court, Atlanta Judicial Circuit, Georgia, dated July 31, 1989.....164

24. March 7, 1989 offensive judgment against appellant Susan Fasse and in favor of appellee Patricia Hodgson in the amount of $51,181.25 plus $10,795.24 attorney fees upon arbitration award of February 3, 1989.....167

25. April 4, 1989 appellants' Motion For Continuance of Civil Litigation with exhibits [subsequent to entry of final judgments against appellants] on civil jury trial calendar.....169

26. Appellant Susan Fasse's nisi prius brief in support of her Motion To Set Aside Judgment.....184

27. *March 6, 1988* offensive judgment against appellant Elizabeth Fasse and in favor of appellee Patricia Hodgson plus $5000.00 attorney fees upon arbitration award and which judgment was prior to the amendatory act of 28 USC sec. 1257 *[effective: Sept. 25, 1988. SEE: sec. 7 of the United States Supreme Court Case Selection Act.]*.....204

28. Arbitration award against appellant Elizabeth Fasse and in favor of appellee Patricia Hodgson plus $5000.00 attorney fees and which arbitration award was prior to the amendatory act of 28 USC sec. 1257 *[effective: Sept. 25, 1988. SEE: sec. 7 of the United States Supreme Court Case Selection Act.]*.....206

29. Arbitration award against appellant Susan Fasse and in favor of appellee Patricia Hodgson in the amount of $51,181.25 plus $10,795.24 attorney fees.....209

30. Advertisement *"How It Works"* sponsored by and under the auspices of the Atlanta Judicial Circuit, Georgia of the Civil Arbitration program in Fulton, County, Georgia disseminated to lawyers and the general public, with quotations of certain select paragraphs of The Fulton County Superior Court compulsory but non-binding Arbitration Rules.....212

Atlanta, November 07, 1990

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. S90A0816 & Case No. 590A0817

SUSAN FASSE V. PATRICIA B. HODGSON

ELIZABETH FASSE V. PATRICIA B. HODGSON

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

United States Court of Appeals

Tenth Circuit

In the Supreme Court of Georgia

Decided; Oct. 17, 1990

S90A0816. FASSE V. HODGSON

S90A0817. FASSE V. HODGSON

PER CURIAM.

Judgment affirmed without opinion pursuant to Rule 59.

All the Justice concur.

SUPREME COURT OF GEORGIA

Atlanta: Nov. 14, 1990

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BY: Benham, J.

The following direction was given:

S90A0816. Susan Fasse v. Patricia B. Hodgson

S90A0817. Elizabeth Jane Fasse v. Patricia B. Hodgson

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on November 7, 1990 such motion is hereby

granted, subject to the following conditions:

1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of his court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the

United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

Justice Robert Benham

SUSAN FASSE,	)
	)
Appellant,	)
	)
	)
vs.	)
	)
PATRICIA B. HODGSON,	)
	)CASE
Appellee.	)No.
	)S90A0816

ENUMERATION OF ERRORS
BRIEF OF APPELLANT

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IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

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Appellant,	)	
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vs.	)	CASE
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PATRICIA B. HODGSON,	)	S90A0816
	)	
Appellee.	)	
	)	

ENUMERATION OF ERRORS

I.

The trial court erred in not granting Appellant's Motion to Set Aside since Appellant did not have notice of the final judgment.

II.

The trial court erred in not granting Appellant's Motion To Set Aside because the manner of publishing the award of the arbitrators pursuant to Fulton County Superior Court Local Rule 1000

is insufficient to satisfy due process of law requirements.

III.

In promulgation and administration under the Fourteenth Amendment to the United States Constitution and the Constitution of Georgia, Fulton Superior Court Local Rule 1000 is unconstitutional in failing to guaranty substantive and procedural due process of law and in denying the equal protection of the laws as being governmental regulation and enactment that is "arbitrarily discriminatory" and vague.

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	)	
Appellee.	)	

BRIEF OF APPELLANT

FACTS

The facts herein are simple, direct and not in conflict.

On August 4, 1988 the Honorable Clarence Cooper, then Judge of the Fulton Superior Court, entered an Order for Arbitration herein which was filed on August 11, 1988. (R-254).

On August 29, 1988 a notice of the scheduling of arbitration for October 21, 1988 was sent to appellant's

counsel of record.

Appellant was seriously ill and suffering from various pathologies. On October 17, 1988 she filed her Motion for Continuance Arbitration and Civil Litigations seeking a continuance from the arbitration scheduled for October 21, 1988. (R-256).

On October 20, 1988 Judge Cooper signed an order granting such continuance, such order being filed on November 28, 1988. Such order re-set the arbitration for February 3, 1989. (R-260)

Appellant was still seriously ill and unable to attend or participate in an arbitration and on January 31, 1989 she filed her Motion for Continuance from the February 3, 1989 arbitration. The required affidavit of her treating

physician was attached to such motion as was the affidavit of her counsel stating that he could not safely go to trial without her being present. (R-261). No objection was filed to such motion by Appellee.

Her counsel contacted the Office of Civil Arbitration on February 1, 1989 and was told that the said motion had been received, the arbitration continued and that same would be re-set to another date (R-300-301).

No further action of record was taken on her said Motion for Continuance; however the arbitration was held on February 3, 1989 without Appellant's knowledge and without the presence of Appellant or her counsel.

On February 3, 1989 the arbitrators awarded Appellee the sum of $61,976.49

against Appellant. (R-266). The award was allegedly "published to the parties" pursuant to Local Rule 1000.

The method of publication of the award used by the Office of Civil Arbitration pursuant to Fulton Superior Court Local Rule 1000 is limited to:

(i) Posting such award on a bulletin board outside the Court Administrator's office on the seventh (7th) floor of the Fulton County Courthouse, and

(ii) Keeping a copy of such award in the case file in the Office of Civil Arbitration. (R-302-303).

The award of the arbitrators is not mailed to counsel of record or the parties in a case. The award is not

served on the parties or counsel of record by the Sheriff's Department. (R-302-303).

Neither Appellant nor her counsel received notice of such award (R-297-301), did not know that the arbitration had even taken place and therefore filed no demand for trial within thirty (30) days thereof.

On March 7, 1989 with no notice of any kind to Appellant or her counsel, Appellee secured Judge Cooper's signature on judgment awarding Appellee $61,976.49 against Appellant. (R-267).

No notification of any kind was given to counsel for Appellant (or to Appellant herself) of the entry of such judgment as required by O.C.G.A. Section 15-6-21(c). (R-297-301).

Appellant thus had no notice of such judgment until she was confronted with it in connection with a credit application at her bank on or about June 10, 1989, some ninety five (95) days following entry of the judgment. (R-297-298).

Appellant contends that the trial court erred in denying her Motion to Set Aside the March 7, 1989 judgment for the following reasons:

(i) The trial court failed to notify her counsel of the entry of the March 7, 1989 judgment as required by O.C.G.A. Section 15-6-21(c) and she had no actual knowledge of same until some ninety five (95) days thereafter.

(ii) The notice of award provisions of Fulton Superior Court Local Rule 1000 violate the Due Process

Clause of the United States and Georgia Constitutions.

(iii) In promulgation and administration under the Fourteenth Amendment to the United States Constitution and the Constitution of Georgia, Fulton Superior Court, Local Rule 1000 is unconstitutional in failing to guaranty substantive and procedural due process of law and in denying the equal protection of the laws as being governmental regulation and enactment that is "arbitrarily discriminatory" and vague.

ARGUMENT OF LAW

I.

APPELLANT'S MOTION TO SET ASIDE SHOULD HAVE BEEN GRANTED BECAUSE THE TRIAL COURT FAILED TO NOTIFY COUNSEL FOR APPELLANT OF THE ENTRY OF JUDGMENT AS REQUIRED BY O.C.G.A. Section 15-6-21(c).

O.C.G.A. Section 15-5-21(c) requires the trial court to notify counsel for the losing party of the entry of judgment against such party. Such Code section has been the law in Georgia for almost 100 years.

The record is clear and uncontroverted that no such notification was given to counsel for Appellant. (R-297-301, 334).

Recent Georgia law is replete with cases requiring that a Motion To Set Aside be granted where no notice of the entry of judgment is sent by the trial court or by the clerk to counsel for the losing party.

The landmark case on such issue is Cambron s. Canal Insurance Company, 246 Ga. 147, 269, S.E.2d 426 (1980).

In Cambron, supra at p. 428, his Court stated as follows:

"But where no notice is sent by the trial court or by the clerk to the losing party, this court holds that an action may be brought under Code Ann. Sec. 81A-160(g) [now O.C.G.A. Section 9-11-60(d)] to set aside the earlier judgment; and upon a finding that notice was not provided as required by Code Ann. 24-2620 [now O.C.G.A. Section 15-6-21(c)], the motion to set aside may be granted, the judgment re-entered, and the thirty day period within which the losing party must appeal will begin to run from the date of the re-entry." (Emphasis added).

Even though the lack of notice of the judgment issue was raised by Appellant

in the trial court, (R-282), no specific ruling was made thereon. The record is clear however that the required notice was not given and in fact Appellee contended that no such notice was even required. (R-297-301, 334).

Cambron, supra, has been expressly followed or cited with approval in numerous cases in the Georgia Court of Appeals since it was handed down. Jefferson-Pilot Fire & Casualty Company vs. Combs, 166 Ga. App. 274, 304 S.E.2d 448, 449 (1983); Atlantic-Canadian Corporation vs. Hammer, Siler, George Associates, Inc., 167 Ga. App. 257, 306 S.E.2d 22, 23 (1983); Barthell vs. State, 174 Ga. App. 459, 330 S.E.2d 180, 181 (1985); Colonial Stores, Inc. vs. Hambrick, 176 Ga. App. 544, 336

S.E.2d 617, 618 (1985); Robinson vs. Kemp Motor Sales, Inc., 185 Ga. App. 492, 364 S.E.2d 623, 624 (1988); Willis vs. State, 189 Ga. App. 404, 377 S.E.2d 552 (1988).

The only case not completely following Cambron, supra, is Crawford vs. Kroger Company, 183 Ga. App. 836, 360 S.E.2d 274 (1987), Beasley, Judge, dissenting. In Crawford, supra, at p. 275, summary judgment was announced against Crawford from the bench in open court, at a hearing on such motion. Crawford filed a motion to "reopen" the case 59 days thereafter which was denied. The Georgia Court of Appeals apparently held that actual notice of the judgment received by the judgment being announced in Crawford's presence in open court by the trial judge was

sufficient compliance with O.C.G.A. Section 15-6-21(c). There is of course no evidence whatsoever that any actual notice of any kind was received by Appellant herein or her counsel. (R-297-301).

The theory and logic of the requirement of notice set forth in O.C.G.A. Section 15-6-21(c) vis-a-vis a timely appeal is set forth in one sentence of Judge Beasley's dissenting opinion in Willis v. State, 186 Ga. App. 197, 366 S.E.2d 778, 781 (1988), as follows:

> A losing party cannot be expected to file a notice of appeal within 30 days if he does not have notice of the decision. (Emphasis added.)

Judge Beasley's dissent in Willis, supra, was adopted by this Court's

Order on certiorari in Willis (case no. 45592) remanding the case to the trial court with direction that an out-of-time appeal motion be granted. Willis vs. State, 189 Ga. App. 404, 377 S.E.2d 552 (1988), supra.

Lastly Appellant notes that Appellee cited Jordan vs. Caldwell, 229 Ga. 343, 344, 191 S.E.2d 530 (1972) in her Response To [Appellant's] Application for Discretionary Appeal herein in support of her contention that Appellant was not entitled to have this appeal heard because "appellant failed to file an appeal within 30 days after the entry of the judgment on the arbitration". (See Appellee's Response to [Appellant's] Application for Discretionary Appeal pgs. 3-4). Appellee has apparently failed to

notice that Cambron, supra at p. 428 expressly overruled Jordan, supra, to the extent Jordan, supra, was "inconsistent with this (Cambron) holding." There is no question that where notice of judgment has not been given as required by O.C.G.A. Section 15-6-21(c), Jordan, supra, has been overruled by and supplanted by Cambron, supra.

The Motion to Set Aside should have been granted.

II.

THE NOTICE OF AWARD PROVISIONS OF FULTON SUPERIOR COURT RULE 1000 DO NOT PROVIDE FOR ACTUAL NOTICE AND THEREFORE VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES AND GEORGIA CONSTITUTIONS.

The procedure set forth in Cambron, supra, results in the March 7, 1989 judgment being set aside and then re-entered, with the 30 day appeal period

commencing upon the re-entry date. In other words the application of Cambron, supra, takes us back in time to March 7, 1989 with a judgment in place as of that date with all appeal rights intact.

In most cases such procedure would be sufficient to resolve this appeal. Appellant contends however that no such judgment should have been granted at all because the method used to publish the award of the arbitrators pursuant to Fulton Superior Court Local Rule 1000 is insufficient to give such notice of the award as is required to satisfy due process of law requirements, as set forth below.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1 of

the Georgia Constitution require that a person's interest in property not be taken without due process of law.

The method of publishing the award of the arbitrators set forth above fails to satisfy the requirement of due process and a reversal of the trial court's decision appealed herein is necessary and proper.

The issue herein is controlled by three significant United States Supreme Court decisions which make it clear that actual notice of the award rather than posting it on a bulletin board is required. Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Mennonite Board of Missions vs. Adams, 462 U.S. 791 (1983) and Tulsa Professional Collection Services, Inc. vs. Pope, 485 U.S. 478 (1988). See

also Hollis v. Tanner, 177 Ga. App. 759, 341 S.E.2d 291, 292 (1986).

In Mulane, supra, the Supreme Court held that notice by publication of a notice to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known. The Court noted at p. 314 as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Emphasis added.)

The significance of the notice of award provision of Fulton Superior Court Local Rule 1000 is of course that unless a demand for trial is made within thirty (30) days of the award of the arbitrators a waiver of trial results and a judgment may be entered. Without adequate notice of the award Appellant cannot logically be expected to file her demand for trial on a timely basis. Her due process rights were thus violated by the lack of proper notice.

In Mennonite, supra at p. 800, the United States Supreme Court in a case involving notice by publication of a tax sale of real property, resolved the issue of sufficiency of notice provisions when it held as follows:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will affect the liberty or property interests of any party, . . .if its name and address are reasonably ascertainable. (Emphasis added.)

The third decisive United States Supreme Court case, Tulsa Professional, supra, is the most recent case on the issue and presents a virtual textbook study on notice requirements.

Tulsa Professional, supra, involved notice by publication (as opposed to actual notice) of commencement of probate proceedings and the barring of creditors' claims not presented within two (2) months after such publication.

The Syllabus in Tulsa Professional, supra at p. 478, provides a sentence which perfectly sets forth Appellant's position on this appeal, as follows:

> HELD: If appellant's identity as a creditor was known or 'reasonably ascertainable' by appellee . . .the Due Process Clause of the Fourteenth Amendment, as interpreted by Mullane and Mennonite, requires that appellant be given notice by mail or such other means as is certain to ensure actual notice. (Emphasis added.)

The within case fits the requirements for actual notice set forth in Mulane, Mennonite and Tulsa Professional, supra. The identities of Appellant and her counsel were certainly known as were their addresses. Service by mail

pursuant to O.C.G.A. Section 9-11-5 had been accomplished with all other pleadings in the case. As stated in Tulsa Professional, supra at p. 490, "We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice."

Mulane, Mennonite and Tulsa Professional, supra, make it mandatory that this Court reverse the trial court and set aside the judgment. Publishing the award of the arbitrators on a bulletin board in the Courthouse without sending a copy of same to a party or his counsel by mail or otherwise simply does not pass the test of our Constitutional due process actual notice requirements.

III.

IN PROMULGATION AND ADMINISTRATION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF GEORGIA, FULTON SUPERIOR COURT LOCAL RULE 1000 IS UNCONSTITUTIONAL IN FAILING TO GUARANTY SUBSTANTIVE AND PROCEDURAL DUE PROCESS OF LAW AND IN DENYING THE EQUAL PROTECTION OF THE LAWS AS BEING GOVERNMENTAL REGULATION AND ENACTMENT THAT IS "ARBITRARILY DISCRIMINATORY" AND VAGUE.

A.

As set forth hereinabove Local Rule 1000 is constitutionally fatally defective as to substantive and procedural due process by reason of the failure of its notice of award provisions to provide actual notice of the award. Tulsa Professional, supra.

In comparison, the Illinois non-binding arbitration rules adopted by its Supreme Court (Rules 92 and 94) require notice which would seem to be more in line with the "actual notice"

guidelines of Tulsa Professional, Mennonite, and Mulane, supra. Such Rules are as follows:

> Illinois Supreme Court Rule 92. Award and Judgment on Award
>
> (b) Determining an Award. The panel shall make an award promptly upon termination of the hearing. The award shall dispose of all claims for relief. The award may not exceed the sum of $15,000.00, exclusive of interest and costs. The award shall be signed by the arbitrators or the majority of them. A dissenting vote without further comment may be noted. Thereafter, the award shall be filed immediately with the clerk of the court, who shall serve notice of the award, and the entry of the same on the record, to other parties,

including any in default. (Emphasis added.)

Illinois Supreme Court Rule 94. Form of Oath, Award and Notice of Award.

"NOTICE OF AWARD"

"On the _____ day of _____, 19___, the award of the arbitrators dated _____, 19___, a copy of which is attached hereto, was filed and entered of record in this Cause. A copy of this NOTICE has on this date been sent by regular mail, postage prepaid, addressed to each of the parties appearing herein, at their last known address, or to their attorney of record.

Dated this _____ day of _____, 19_____.

_____
Clerk of the Circuit Court"
(Emphasis added.)

The difference between Local Rule 1000's publication of notice of the award of the arbitrators and the actual notice requirement contained in the Illinois Rules is clear and obvious. Local Rule 1000's provisions simply do not provide the actual notice required by the United States Supreme Court cases cited hereinabove and is sorely lacking as to actual due process.

B.

"Equal Protection" is a limitation imposed on the action of state government by the Fourteenth Amendment which means that government regulation cannot be "arbitrarily discriminatory" and only reasonable classifications and discriminations between persons or groups of persons are permitted. Similarly, this is true as to

vagueness. Vick Wo vs. Hopkins, 118 U.S. 346 (1886); Kevishaian vs. Board of Regents, 386 U.S. 589 (1967); Trimble vs. Gordon, 430 U.S. 762 (1977) [striking down a workers compensation law in Illinois which made "vague" and "arbitrarily discriminatory" classifications between legitimate and illegitimate surviving children of a deceased for purposes of death benefits.]

In relevant part, for purposes of this discussion, Fulton Superior Court Local Rule 1000 provides:

> 1. All civil actions filed and seeking primarily money damages of twenty-five thousand dollars ($25,000.00) or less, or for damages in an unstated amount, shall be required to go through compulsory but

non-binding arbitration. . .The trial judge to whom the case has been assigned may order arbitration at any time, at his or her discretion, on any case whether or not it otherwise qualifies for arbitration . . .(Emphasis added.)

The foregoing leaves the qualification for arbitration to the whims and artfulness of the pleader as to whether to ask for $25,000.00 and thus qualify for arbitration or $25,001.00 and not qualify for arbitration. On the other hand if the trial judge upon vague or unwritten standards determines that a case with a three million dollar request for damages will be sent to arbitration, the judge may do so on his own motion. Such rule is "arbitrarily

discriminatory" and too "vague" to meet the requirements of Fourteenth Amendment equal protection. In the two appeals now before this court, (Case No. S90A016 and Case No. S90A017) such cases had been consolidated by order of the trial court; however the trial court without notice and without any hearing then severed the cases and ordered them to arbitration separately, even though the requests for damages of each case far exceeded the $25,000.00 limitation.

As now promulgated and administered the litigants and their attorneys are confronted with vagueness and arbitrary discrimination as to whether or not a given case is subject to arbitration.

Further and in relevant part, for purposes of this discussion, Fulton Superior Court Local Rule 1000 provides

> 3. The Court Administrator shall schedule and set dates for arbitration hearings . . .not less than 180 days subsequent to filing. . .(Emphasis added.)

In contravention of such provision the cases on appeal herein after being severed for arbitration by the trial court without notice, were first set for arbitration a year and one-half to two and one-half years "subsequent to [their] filing", which constitutes an administrative breach of equal protection guaranteed to citizens of Georgia.

CONCLUSION

It is respectfully requested that this Court reverse the judgement of the trial court and enter judgment in favor of the Appellant and against the Appellee and that Appellant have her costs and expenses. Publishing the award of arbitration on the seventh floor of the courthouse without delivery of or mailing of a copy of same to a party or his attorney, when known or reasonably ascertainable, does not pass the test of our Constitutional due process actual notice requirements.

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ENUMERATION OF ERRORS
BRIEF OF APPELLANT

SUBMITTED BY:

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ENUMERATION OF ERRORS

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III.

In promulgation and administration under the Fourteenth Amendment to the United States Constitution and the Constitution of Georgia, Fulton Superior Court Local Rule 1000 is unconstitutional in failing to guaranty substantive and procedural due process of law and in denying the equal protection of the laws as being governmental regulation and enactment that is "arbitrarily discriminatory" and vague.

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IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

ELIZABETH JANE FASSE,	)	
	)	
Appellant,	)	
	)	
	)	
vs.	)	CASE
	)	No.
PATRICIA B. HODGSON,	)	S90A0817
	)	
Appellee.	)	

BRIEF OF APPELLANT

Comes now ELIZABETH JANE FASSE, Appellant by and through her counsel of record and files her brief herein, respectfully showing the Court as follows:

FACTS

On September 29, 1987 the Honorable Clarence Cooper, then Judge of the Fulton Superior Court, entered an Order for Arbitration herein which was filed on September 30, 1987. (R-75).

On November 23, 1987 Judge Cooper's Order consolidating this case with Susan Fasse vs. Patricia B. Hodgson, Case No. D-14463 (Case No. S90A0816 in this Court) was filed. (R-76). Appellant's counsel was not notified of such arbitration hearing.

The arbitration was ultimately rescheduled to April 1, 1988 by Judge Cooper's order of March 9, 1988, entered on March 10, 1988. (R-114).

On April 1, 1988 the arbitration was held without the presence of Appellant or her counsel. The arbitrators awarded Appellee $5,000.00 attorney's fees against Appellant. (R-115). The award of the arbitrators was allegedly published to the parties pursuant to Fulton Superior Court Local Rule 1000 by publishing same on a

bulletin board outside the Court Administrator's office on the seventh (7th) floor of the Fulton County Courthouse and by keeping a copy of such award in the case file in the Office of Civil Arbitration.

The award of the arbitrators was not mailed to counsel of record in the case nor was the award served on counsel or the parties by the Sheriff's Department.

Therefore neither Appellant nor her counsel received notice of such award and therefore filed no demand for trial within thirty (30) days thereof.

On June 6, 1988, with no notice of any kind to Appellant or her counsel, Appellee secured Judge Cooper's signature on a judgment awarding

Appellee $5,000.00 attorney's fees against Appellant. (R-116).

No notification of any kind was given to counsel for Appellant of the entry of such judgment as required by O.C.G.A. Section 15-6-21(c).

Appellant contends that the trial court erred in denying her Motion to Set Aside the June 6, 1988 judgment for the following reasons:

(i) The trial court failed to notify her counsel of the entry of the June 6, 1988 judgment as required by O.C.G.A. Section 15-6-21(c).

(ii) The notice of award provisions of Fulton Superior Court Local Rule 1000 violates the Due Process Clause of the United States and Georgia Constitutions.

(iii) In promulgation and administration under the Fourteenth Amendment to the United States Constitution and the Constitution of Georgia, Fulton Superior Court Local Rule 1000 is unconstitutional in failing to guaranty substantive and procedural due process of law and in denying the equal protection of the laws as being governmental regulation and enactment that is "arbitrarily discriminatory" and vague.

ARGUMENT OF LAW

Appellant hereby adopts and incorporates herein by reference the Statement of Facts and Argument of Law set forth in the Brief of Appellant Susan Fasse in Georgia Supreme Court Case No. S90A0816, styled Susan Fasse, Appellant vs. Patricia B. Hodgson,

Appellee, filed contemporaneously herewith, same being a companion case hereto, the two cases having been originally consolidated in the trial court.

CONCLUSION

It is respectfully requested that this Court reverse the judgment of the trial court and enter judgment in favor of the Appellant and against the Appellee and that Appellant have her costs and expenses. Publishing the award of arbitration on the seventh floor of the courthouse without delivery of or mailing of a copy of same to a party or his attorney, when known or reasonably ascertainable, does not pass the test of our Constitutional due process actual notice requirements.

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IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

SUSAN J. FASSE and ELIZABETH JANE FASSE,	)
Appellants,	)NO. S90A0816
vs.	)No. S90A0817
PATRICIA B. HODGSON,	)
Appellee.	)Consolidated

RULE 47:

MOTION FOR RECONSIDERATION
and
PETITION FOR REHEARING

SUBMITTED BY:

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RULE 47

MOTION FOR RECONSIDERATION
and
PETITION FOR REHEARING

Pursuant to Rule 47 Appellants timely requests the Court to reconsider its judgment order dated October 17, 1990 affirming without opinion the judgments of the Superior Court of Fulton County (attached hereto) and shows the Court:

1.

Pursuant to 28 U.S.C.A. sec. 1257 et. seq. these appeals have "drawn into question" the constitutionality and validity of so called compulsory but non-binding Civil Arbitration Local Rule 1000 of the Fulton County, Georgia, Superior Court on the ground that it is repugnant to the Fourteenth (14th) Amendment of the United States Constitution and that this court's

decisions herein of October 17, 1990, without opinion, is in favor of its validity on the issue of adequate due process "notice" and the equal protection of the laws.

Throughout the years this court has consistently and loyally invoked the stare decisis of its past rulings and holdings and steadfastly, loyally, unwaveringly and purposefully followed is own prior judgments and opinions and those of the United States Supreme Court on the requisite mandates and guidelines of "bedrock" "notice" due process and equal protection from Jefferson Fire Insurance Company v. Brackin, 140 Ga. 637 decided on October 2, 1913, to Womble v. Commercial Credit Corporation, 231 Ga. 569 decided on January 8, 1974, to

Thompson v. Lagerquist, 232 Ga. 75 decided on April 4, 1974, to Benton v. Modern Finance & Investment Company, 244 Ga. 533 decided on October 25, 1979, tc Funderburke v. Kellett, 257 Ga. 822 decided on February 12, 1988, through Sun V. Jones, 188 Ga. 552 decided on September 23, 1988, emanating from this court, and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (70 SC 652) (1949), Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (103 SC 2706) (1983), Tulsa Professional Collection Services, Inc. v. Pope, Executrix of the Estate of Pope, 485 U.S. 478 (1988) emanating from the U.S. Supreme Court.

That is until now and in these appeals where this court has sustained the Constitution of the United States

due process and equal protection validity, without opinion, of compulsory but non-binding Civil Arbitration Local Rule 1000 of the Fulton County, Georgia, Superior Court which as to "notice" of an arbitration award provides:

Local Arbitration Rule 1000

Rule 14.

> The award is published to the parties, and the written award filed with the Court Administrator or his designee on the day of the hearing. (R-301-303).

And published by rule and custom as follows:

(i) - Posting such award on a bulletin board outside the Court Administrator's Office on the seventh

(7th) floor of the Fulton County Courthouse, and

(ii) Keeping a copy of such award in the case[s] file[s] in the Office of Civil Arbitration. (R-302-303).

And as to equal protection provides:

Local Arbitration Rule 1000

Rule 1.

All civil actions filed and seeking primarily money damages of twenty five thousand dollars ($25,000) or less, or for damages in an unstated amount, shall be required to go through compulsory but <u>non-binding</u> arbitration. . . .The trial judge to whom the case has been assigned may order arbitration at any time, at his or her discretion, on any case whether or not it otherwise qualifies for

arbitration. . . .(N.B.: It is binding at least under the facts and circumstances as memorialized in these actions appeal due to the failure of due process "notice".) (Emphasis added.)

Thus this Motion For Reconsideration and Petition For Rehearing, and, respectfully the court is requested to consider the following:

For purposes of 28 U.S.C.A., sec. 1257 et seq. Fulton County Superior Court, Atlanta Judicial Circuit, compulsory but non-binding arbitration Local Rule No. 1000 is a "State statute" or state action, Reinman v. Little Rock, Ark., 237 U.S. 171 (1915); Sultan Ry. & Timber Co. v. Dept. Labor and Industries of State of Washington, 277 U.S. 135 (1928); Tulsa Professional

Collection Services, Inc. v. Pope, Executrix of the Estate of Pope, 485 U.S. 478 (1988) and this court by its judgment order of October 17, 1990 (attached) has sustained the validity of Local Rule 1000 when it has been drawn in question on the ground that it is repugnant to the 14th Amendment of the United States Constitution and this court's decision is in favor of its validity, Goodyear Atomic Corp. v. Miller, 486 U.S. 176 (1987) at page 178:

> [A] state statute is sustained within the meaning of section 1257 [sic. 28 U.S.C.A., sec. 1257 et. seq.] when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. Japan

Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 441 (1979).

The decision and judgment of this court of October 17, 1990 in sustaining and upholding Local Rule 1000 as valid when it has been drawn in question on the ground that it is repugnant to the 14th Amendment of the United States Constitution is final. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482-483 (1975).

In these cases this court granted appellants' Rule 25 (a) [OCGA 5-6-35] applications for discretionary appeal on the grounds that (1) Reversible error appears to exist, or (2) The establishment of a precedent is desirable and then affirmed the judgments of the court below without opinion pursuant to Rule 59 and the

record would suggest on the grounds of Rule 59 (2), as the evidence that would have supported the granting of the Rule 25 (a) applications was one and the same as the evidence on review in the record on appeal in these cases -- Rule 59 (1) -- and the final judgments appealed from are totally devoid and lacking of any explanation of the decisions of the court below - Rule 59 (3).

2.

This court in Funderburke v. Kellet, 257 Ga. 822 (February 12, 1988) pursuant to the guidelines of the United States Supreme Court in Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (103 SC 2706) (1983) held OCGA 48-4-46 (b) and (c) unconstitutional as not being in accord with the

requirements of due process in only requiring notice publication at the court house and published notice in the county legal organ as to the rights of "a substantial interest in property" of the mortgagee of the property.

In relevant part this court's opinion in Funderburke, supra at pages 822, 823, 824:

"Gregory, Justice.

The appellees sold a parcel of property located in DeKalb County to Annette Johnson, taking back a promissory note and deed to secure debt with a power of sale. Appellees are residents of Fulton County. Thereafter the property was sold for taxes and tax deeds ultimately to appellant Funderburke. No notice was given to the appellees of the tax

sales or of their right to redeem the property. Notice of the foreclosure of the right to redeem was published in the Decatur-DeKalb News era in August and September of 1983. Appellees first learned of the tax sales in 1986 and tendered the redemption price. This was refused on the ground that appellees' right to redeem the property had been foreclosed by their failure to take timely action in response to the published notice. Appellees filed this action to quiet title, tendering funds equivalent to the redemption price into the registry of the court. The issues were tried before a special master who concluded that OCGA 48-4-46, governing the requirements of notice of foreclosure

of the right to redeem property sold at a tax sale, does not comport with due process. The special master concluded that the right of the appellees to redeem the property had not been foreclosed, and that tile should be vested in them. The superior court adopted the findings and conclusions of the special master and made them the order of the court.

1. Under OCGA 49-3-9 (a) the record owner of property to be sold at a tax sale is entitled to notice of the sale by either personal service or by registered or certified mail. Under subsection (b), an owner of the security deed or mortgage is entitled to receive notice of the tax sale by either personal service or by mail only if he annually files an

application for notice with the clerk of the superior court of the county in which the land is located. The code section does not provide for notification of a tax sale to an owner of a security deed or mortgage who fails to apply for notification.

In Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (103 SC 2706) (1983), the United States Supreme Court had under consideration the constitutionality of an Indiana statute which provided that an owner of property to be sold at a tax sale would be notified of the sale by mail, Ind. Code. sec 6-1.1-24-4, but that a mortgagee of the property would be notified by posted notice in the county courthouse and published notice in the county legal organ.

sec. 6-1.1-24-3. Under Indiana law the owner or other person with an interest in the property was entitled to redeem the property for a two-year period following the tax sale. sec. 6-1.1-25-1. If the property was not redeemed, the county auditor was required to issue a tax deed to the purchaser at the tax sale at the end of the two-year period. The Court (U.S. Supreme) held that because a mortgagee has a substantial interest in property that may be significantly affected by a tax sale notice of the tax sale by publication and posting on the courthouse is not sufficient to meet the requirements of due process. That Court held that "[n]otice by mail or other means as certain to ensure actual notice is a

minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . .if its name and address are reasonably ascertainable. 462 U.S. at 800. Based on Mennonite, supra, the special master and trial court in this case found that OCGA 48-4-46(b) and (c) are not in accord with the requirements of due process because an owner of a security deed or mortgage who lives outside the county in which the land is located will only receive published notice of the foreclosure of the right to redeem. We agree.

. . .Notice of the tax sale and notice of foreclosure of the right to redeem are distinct events. under

OCGA 48-4-45 the purchaser at the tax sale must wait a minimum of 12 months to foreclose and "forever bar" the right to redeem, but the statute places no time limitation on how long the purchaser may wait to foreclose the right to redeem. Thus there is a floor, but not a ceiling. Once the right to redeem has been foreclosed under sec. 48-4-45, "the right to redeem is gone, and there is no power even in a court of equity to authorize a redemption of the property..." [Two Georgia Supreme Court cases cited.] The owner of a deed to secure debt or mortgage who does not reside in the county where the land is located has a substantial property interest which will be significantly affected by lack of

actual notification that his right to redeem is to be foreclosed. Notice by publication that this right may be affected does not satisfy the requirements of due process under Mennonite, supra." (Emphasis added.)

In these cases the only method of publication provided for by the State Court of Fulton County enactment [Civil Arbitration pursuant to Fulton Superior Court Local Rule 1000] or carried out by Office of Civil Arbitration pursuant to Fulton Superior Court Local Rule 1000 is limited to:

(i) Posting such award on a bulletin board outside the Court Administrator's Office on the seventh (7th) floor of the Fulton County Courthouse, and

(ii) Keeping a copy of such award in the case[s] file[s] in the Office of Civil Arbitration. (R-302-303).

The award of the arbitrators is not mailed to counsel of record or the parties in a case. The award is not served on the parties or counsel of record by the Marshall's or Sheriff's Department or anyone. There is no other provision for notice of the arbitrators' award which will adversely affect property interests of the parties irrespective of where the parties or counsel may reside. (R-302-303).

Neither appellants or their counsel received any notice of such awards (R-297-301), did not know that the arbitration had even taken place and

therefore were prevented from filing and making a demand for trial [de novo] within thirty (30) days thereof. SEE: Appellants' briefs page 3.

3.

This court in Sun v. Jones, 188 Ga. 552 (373 SE2d 656) (September 23, 1988) pursuant to the guidelines of the United States Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (70 SC 652) (1949) held that the minimum requirement of the State of Georgia action for notice and personal service, if unrefuted, after pendency is met by the service by mail, to wit, at pages 552 and 553:

"McMurray, Presiding Judge.

'An elementary and fundamental requirement of due process in any proceeding which is to be accorded

finality is notice reasonably calculated . . .to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (70 SC 652) (1949) . . .We concluded that once apprised of the pendency of a lawsuit a party's constitutional right to notice and the opportunity to be heard is met by the service by mail provided by Code Ann sec. 81-A-105(b) [now OCGA 9-11-5(b)]. (Georgia Supreme Court case cited.)' (Emphasis added.)

In these present actions and appeals, pursuant to Fulton Superior Court Local Rule 1000, the award of the arbitrators

is not mailed to counsel of record or the parties in a case. The award is not served on the parties or counsel of record by the Marshall's or Sheriff's Department or anyone. There is no other provision for notice of the arbitrators' award which will adversely affect property interests of the parties irrespective of where the parties or counsel may reside. (R-302-303).

Neither appellants or their counsel received any notice of such awards (R-297-301), did not know that the arbitration had even taken place and therefore were prevented from filing and making a demand for trial [de novo] within thirty (30) days thereof. SEE: Appellants' briefs page 3.

This court in Benton v. Modern Finance & Investment Company, 244 Ga. 533 (October 25, 1979) relying on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (70 SC 652) (1949) and this court's own rulings in Thompson v. Lagerquist, 232 Ga. 75, 76 (1974) and Womble v. Commercial Credit Corp., 231 Ga. 569, 571 (1974) which both adopted Mullane, supra, held unconstitutional OCGA 81A-104(d)(6) as violative of the due process clause of the 14th Amendment to the United States Constitution and as providing for notice not reasonably calculated to reach interested persons or that the forum chosen is not substantially less likely to bring home notice than other of the feasible and customary

substitutes, such as mailing, and this court tenaciously, firmly and securely announced as though chiseled in judicial granite that: "Notice is the very bedrock of due process."

The Benton, supra, decision:

Jordan, Justice.

". . . appellee filed a complaint in the State Court of Fulton County against. . .appellant, on a promissory note in the amount of seventy-three dollars ($73) plus interest and attorney fees. When the appellant filed no answer within the lawful period, a default judgment was entered against her in the amount of eight-five and 94/100 dollars ($85.94) . . .appellant filed a motion to set aside the default judgment which was denied.

. . .appellant did not receive actual notice but . . .appellant was served in accordance with OCGA 81A-104(d)(6) which provides that "If the principal sum involved is less than $200 [service may be perfected] by leaving a copy [of the summons and complaint] at the [defendant's] most notorious place of abode."

. . .appellant urges that the rial court erred in holding that OCGA 81A-104(d)(6) does not violate the due process clause of the 14th Amendment to the United States Constitution. For the reasons noted below, we agree with the appellant and reverse the trial court's denial of her motion to set aside the default judgment.

'. . .[T]he constitutional validity of any chosen method [of service] may be

defended on the ground that it is in itself reasonably certain to inform those affected . . .or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.' Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (70 SC 652) (1949). '[N]otice is the very bedrock of due process.' Thompson v. Lagerquist, 232 Ga. 75, 76 (205 SE2d 267) (1974).

As the United States Supreme Court expressly noted, 'Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. ' Id. at 318.

Therefore OCGA 81A-104(d)(6) conforms to the constitutional dictates of due process only if its form of service is 'reasonably certain to inform those affected.'

'The mere leaving of copy of suit at the residence of the defendant is not reasonably calculated apprise him of he pendency of an action against him. He may be absent from such abode for an extended length of time. He may be in the process of moving from one residence to another. The copy may be destroyed by inclement weather, or be removed by other persons.' Womble v. Commercial Credit Corporation, 231 Ga. 569, 571 (203 SE2d 204) (1974). Accordingly, we hold that OCGA 81A-104(d)(6), which authorizes service by leaving a copy at the defendant's most

notorious place of abode on the sole condition that the principal sum involved be less than $200 violates the due process clause of the 14th Amendment of the United States Constitution.
Judgment reversed." (Emphasis added.)

Georgia Supreme Court Justice Hill attempted in a concurring opinion to assist the Georgia legislature in redrafting OCGA 81A-104(d)(6) so that it comported to the mandates of the 14th Amendment of the United States Constitution and the guideline of the United States Supreme Court in Mullane, supra, as follows:

"Hill, Justice concurring.
Although I concur in the judgment for the reasons stated in the opinion, I

believe the objections specified in Womble, supra, can be cured by tightly drawn legislation. For example, taping the service copy of the complaint in a marked, waterproof packet high on the door, making it a misdemeanor for a person other than a resident of those premises to remove such marked packet, and duplicating service by return mail could overcome or minimize most of the Womble objections." (Emphasis added.)

Here appellant, Susan, had an arbitration award by default entered against her in the amount of $61,976.49 plus interest after she had a few days before filed her conforming and legal motion for continuance, supported by the affidavit of her treating physician

of her surgeries in Chattanooga, Tennessee, and the counsel was told by the Office of Arbitration that the arbitration had been continued, and then her only notice or that of her counsel of the entry of the default arbitration award in the amount of $61,976.49 plus interest was the posting or "publishing" of it on a bulletin board on the seventh (7th) floor of the courthouse--a highly secured area with limited access by and to the public--and a copy of the award kept in a desk drawer of the Administrator of the Office of Arbitration on the same limited access seventh (7th) floor of the same courthouse. Neither appellant Susan or her mother, appellant Elizabeth,--who under the same circumstances had an

arbitration award of $5,000.00 dollars for attorney fees [attorney fees were not plead for legally or asked for factually in the underlying action filed by appellee in the Superior Court of Fulton County] entered against her--received any other notice, nor did her attorney, by service at their published of record addresses, either personally or by the usual and customary United States mail methods or any other known or "reasonably calculated" or accepted modes of notice or service "to reach interested parties." Thus the 30 day period expired in which appellants could have easily cured the notice and service deficiency by peremptorily filing their Rule 1000 "Demand For Trial De-Novo".

Thereafter, judgments on the default arbitration awards were entered without notice against both appellants, contrary to OCGA 15-6-21(c) and Cambron v. Canal Insurance Company, 246 Ga. 147 (269 SE2d 426) (1980). It was only after a credit problem arose with appellant Susan and both appellants having their bank accounts taken by garnishment that either of them or their counsel knew anything of what had transpired. (R-297-301) (R-302-303).

The 14th Amendment of the United States Constitution "unconstitutional" lack of notice and lack of service was expressly provided for in Superior Court of Fulton County. Local [Arbitration] Rule 1000, as follows:

Local Arbitration Rule 1000

Rule 14.

> The award is published to the parties, and the written award filed with the Court Administrator or his designee on the day of the hearing. (R-302-303).

How published by rule and custom and practice? As follows:

(i) Posting such award on a bulletin board outside the Court Administrator's Office on the seventh (7th) floor of the Fulton County Courthouse, and

(ii) Keeping a copy of such award in the case[s] file[s] in the Office of Civil Arbitration. (R-302-303).

All contrary to the due process mandates and guidelines setup by the United States Supreme Court in Mullane v. Central Hanover Bank & Trust Co.,

339 U.S. 306 (70 SC 652) (1949), Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (103 SC 2706) (1983), Tulsa Professional Collection Services, Inc. v. Pope, Executrix Of The Estate Of Pope, 485 U.S. 478 (1988) and the many, many decisions of this Court, herein discussed, imposing these United States Supreme Court guidelines to and against the "State actions" of the legislative or judicial enactments of the State of Georgia.

5.

This court in Womble v. Commercial Credit Corp., 231 Ga. 569 (January 8, 1974) relying on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (70 SC 652) (1949) held unconstitutional OCGA 81-202 [Code of 1933] as violative of the due process

clause of the 14th Amendment to the United States Constitution and as providing for notice not reasonably calculated to reach interested persons or that the forum chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

The Womble, supra, decision:

"Mobley, Chief Justice.

"The service on the appellant by leaving a copy at his most notorious abode in the county was not reasonably calculated to apprise him of the pendency of the action, and was a denial of due process of law as guaranteed by Fourteenth Amendment of the Constitution of the United States.

Motion to set aside judgment; constitutional question.

Gwinnett State Court.

[Appellant's] motion to set aside alleged that service was made by leaving a copy of the suit at his most notorious place of abode, and that he never received actual notice of the suit. The motion asserts that [OCGA] 81-202, as amended of the Code of 1933. . .which provided that leaving a copy at the defendant's residence was sufficient service, was not reasonably calculated to inform a defendant of the claims made against him, and that the rendering of a default judgment after such service deprived the appellant of his property without due process of law, in violation of the Fourteenth

Amendment to the Constitution of the United States.

The question for determination in the present case is whether the provision of [OCGA] 81-202 of the Code of 1933, authorizing service by leaving copy at the residence of the defendant, afforded due process as required by the Fourteenth Amendment of the United States Constitution. Such service has been held to be sufficient [case cited] but not as against a constitutional attack. In Jefferson Fire Ins. Co. v. Brackin, 140 Ga. 637 (2) (79 SE 467) this court held: 'One of the essential elements of due process of law, to which every one is entitled before he can be lawfully deprived of this property, is notice of the

procedure against him. This notice must not be dependent upon chance, and must at least be such as with reasonable probability will apprise him of the pendency of the proceeding. . .'

The United States Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (70 SC 652) (1949) laid down the following principle 'An elementary and fundamental requirement of due process in an proceeding which is to be accorded finality is notice reasonably calculated under all the circumstance, to apprise interested parties of the pendency of the action and afforded them an opportunity to present their objections..' We therefore conclude that the provision

of [OCGA] 81-202 of the Code of 1933, authorizing service by leaving a copy at the residence of the defendant, was in violation of the due process clause of the Fourteenth Amendment of the United States Constitution. Judgment reversed. All the Justices concur." (Emphasis added.)

6.

This court again in Thompson v. Lagerquist, 232 Ga. 75 (April 4, 1974) which it cites with approval and controlling in Benton v. Modern Finance & Investment Company, 244 Ga. 533 (1979), heretofore discussed, in applying the notice guidelines and standards of due process of the 14th Amendment of the United States Constitution in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306

(70 SC 652) (1949). Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (103 SC 2706) (1983), Tulsa Professional Collection Services, Inc. v. Pope, Executrix of the Estate of Pope, 485 U.S. 478 (1988), reverses a default judgment against appellant taken pursuant OCGA 81A-104(d)(7) as being violative of the notice due process requirements since "notice is the very bedrock of due process."

The Thompson, supra, decision:

"Jordan, Justice.

"This appeal is from a judgment dismissing the appellant's complaint in Fulton County Superior Court to set aside and vacate a judgment rendered against him in the Civil Court of Fulton County and to enjoin the prosecution of said judgment.

. . .a default judgment was rendered in the Civil Court. . .against the appellant. . .Subsequent thereto, the appellee proceeded to prosecute said judgment through a garnishment proceeding against the appellant. [The same as here.] Thereafter. . .appellant filed this complaint in Fulton Superior Court to set aside and vacate the default judgment and to enjoin the appellee from the prosecution of said judgment. The sworn pleadings and uncontradicted evidence before the trial court show. . .that neither the appellant nor his wife was ever advised concerning the suit and summons until after judgment, nor have they ever received or seen the

suit and summons issued in the Civil Court of Fulton County. . . [OCGA] 81A-104(d)(7) requires delivery of the summons and complaint "in all other cases to the defendant personally, or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.' This court has strictly construed the provisions of this Code section, and rightfully so, since notice is the very bedrock of due process.

Judgment reversed. All the Justices concur." (Emphasis added.)

7.

This court as far back as 1913 in Jefferson Fire Insurance Company v. Brackin, 140 Ga. 637 (October 2, 1913)

held the provision of the Georgia Official Code, sec. 2564 unconstitutional, under the due process requirements of the 14th Amendment to the United States Constitution, which permitted service and notice being perfected by leaving a copy of the summons and petition or writ at the place of doing business at the time the cause of action accrued or the contract was made out of which the action arose. This holding and opinion although scores of years before Mullane, supra, Mennonite, supra, and Tulsa, supra, was in complete conformity with these later day holdings of the United States Supreme Court as to the minimum requirements for due process under the 14th Amendment of the United States Constitution.

The Jefferson case, supra, in applicable part at page 638:

"Fish, C.J.

"The Civil Code, sec. 2564, provides, that, in an action of the character referred to. . .service may be perfected upon the insurance company by leaving a copy of the petition or writ where the agency or place of doing business was located in the county at the time the cause of action accrued, or the contract was made out of which the same arose. This provision of the code section is unconstitutional, because violative of the due-process cause of both the State and Federal constitutions. One of the essential elements of 'due process of law,' to which every one is entitled before he can be lawfully

deprived of his property, is notice of the procedure against him. This notion must not be dependent upon chance, and must at least be such as with reasonable probability will apprise him of the pendency of the proceeding.' [Georgia authorities cited.] (Emphasis added.)

As in these cases, is the posting, only, of the arbitration awards on a bulletin board on the seventh (7th) floor of a courthouse, which is secured with limited access to and by the general public, and the keeping of a copy of the arbitration awards in the desk drawer of the private office of the Administrator of Arbitration to which the public, the appellants and their attorneys have no access a practice of and notion of due process

that leaves notice to chance and affords no reasonable probability that the defendants will ever know of the action taken against them that will deprive each of their property?

Under this state of the art of due process a citizen would be better off casting his lot with the town crier and his brass bell at 8:00 a.m., once a week, on the courthouse steps, or per Rudyard Kipling: ". . .take one heap of all your winnings and risk them on one turn of 'pitch-and-toss'."

CONCLUSION

Respectfully, this Court is requested to grant appellants' Motion For Reconsideration and to vacate its judgment order herein entered October 17, 1990 and to further enter its order reversing the judgments of the Superior

Court of Fulton County, Georgia and to enter judgment in favor of appellants and against appellee, with or without opinion as the Court deems appropriate.

Susan Fasse and Elizabeth Jane Fasse, appellants.

By: _____
One of their attorneys

SUBMITTED BY:

ATTORNEYS FOR APPELLANTS:

David N. Levine, Esq.
GA Bar No. 448400
DAVID N. LEVINE P.C.
8565 Dunwoody Place
Building 15
Atlanta, Georgia 30350
(404) 594-9444

Thomas V. Cassidy, Esq.
Attorney for Appellant
Ill. Bar No. 412406
Admitted pro hac vice by order 1-14-88
2648 Sharondale Circle N.E.,
Atlanta, Georgia 30305
(404) 237-0494

In the Supreme Court of Georgia

Decided: Oct 17, 1990

S90A0816. FASSE V HODGGSON
S90A0817. FASSE V HODGSON

PER CURIAM.

Judgment affirmed without opinion pursuant to Rule 59.

All the Justice concur.

SUPREME COURT

STATE OF GEORGIA

Oct. 24, 1989

TO ALL COUNSEL;

RE: Application No. S89D0617,
Susan Fasse v. Patricia B. Hodgson

The Court today granted this application for discretionary appeal. All the Justices concur, except Clarke, P.J. and Smith, J., not participating.

Your notice of appeal must be filed in the trial court within 10 days from this date. When the record is received from the trial court and docketed in this court you will be sent a docketing notice showing the date of docketing and the Case Number assigned. The appellant's enumeration of errors and briefs will be due in this Court within 20 days from the date of docketing; the

appellee's briefs will be due within 40 days from the date of docketing or within 20 days after the appellant's briefs are filed, whichever is later.

The Court is particularly concerned with, and requests that you address in your briefs, the following:

1) whether the motion to set aside should have been granted because the defendant did not have notice of the final judgment?

2) whether the notice of award provisions of Fulton County Local Rule 1000 are sufficient?

Joline B. Williams, Clerk

By:_____

SUPREME COURT

STATE OF GEORGIA

Nov. 20, 1989

TO ALL COUNSEL;

RE: Application No. S90D0150, Elizabeth Jane Fasse v. Patricia B. Hodgson

The Court today granted this application for discretionary appeal. All the Justices concur.

Your notice of appeal must be filed in the trial court within 10 days from this date. When the record is received from the trial court and docketed in this court you will be sent a docketing notice showing the date of docketing and the Case Number assigned. The appellant's enumeration of errors and briefs will be due in this Court within 20 days from the date of docketing; the

appellee's briefs will be due within 40 days from the date of docketing or within 20 days after the appellant's briefs are filed, whichever is later.

The Court is particularly concerned with, and requests that you address in your briefs, the following:

1) The validity of the notice of award provisions of Fulton County Local Rule 1000 and

2) Whether the motion to set aside should have been granted because the defendant did not have notice of the final judgment.

Joline B. Williams, Clerk

By:_____

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

SUSAN FASSE	)
	)
Petitioner/Appellant,	)
	)
	)
vs.	)
	)
PATRICIA B. HODGSON,	)
	)CASE
Respondent/Appellee.	)No.
	)S89D0617

PETITION

Comes now Susan Fasse, Petitioner herein by and through her counsel and respectfully files her Petition pursuant to O.C.G.A. Section 5-6-35, respectfully showing as follows:

1.

The errors to be enumerated on Appeal are as follows:

(i) The trial court erred in not ruling on Petitioner's Motion for

Continuance filed pursuant to O.C.G.A. Section 9-10-154. on January 31, 1989.

(ii) The trial court erred in not ruling that Fulton Superior Court Local Rule 1000 violates the due process clause of the United States and Georgia Constitutions in that the methods of publishing the award of the arbitrators (by posting a copy of same on a bulletin board outside the Court Administrator's Office and keeping a copy of same in the Office of Civil Arbitration Case file) are insufficient to give such notice of the award as is required by the said due process clause.

(iii) The judgment entered on March 7, 1989 was absent from the Court's file thus preventing Petitioner

from having knowledge of same in order to protect her rights.

2.

The Supreme Court of Georgia has jurisdiction of this case on Appeal pursuant to Article 6, Section 6, Paragraph II of the Georgia Constitution for the reason that the Supreme Court of Georgia has exclusive appellate jurisdiction in a case where the constitutionality of a law is in question. At issue here is whether Fulton Superior Court Local Rule 1000 is violative of the due process clause of the Georgia and United States Constitutions.

3.

The Order being appealed is the Order of the Honorable Clarence Cooper, Judge, Fulton Superior Court, entered

August 28, 1989, denying Petitioner's Motion to Set Aside Judgment.

4.

Attached hereto and made a part hereof as Exhibits are the following:

(i) Exhibit "A" - Copy of Order appealed.

(ii) Exhibit "B" - Copy of Motion To Set Aside Judgment (with exhibits).

(iii) Exhibit "C" - Copy of Brief in Support of Motion to Set Aside Judgement.

(iv) Exhibit "D" - Copy of Brief in Opposition to Defendant's Motion To Set Aside Judgment.

(v) Exhibit "E" - Fulton Superior Court Local Rule 1000 (14).

Wherefore Petitioner prays that her Petition herein be granted and that the Order appealed be reversed.

DAVID N. LEVINE P.C.

David N. Levine, Esq.
Attorney for Petitioner/Appellant
GA Bar No. 448400

5775 C Peachtree Dunwoody Rd.
Suite 200
Atlanta, GA 30342
(404) 256-9444

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

ELIZABETH JANE FASSE	)
	)
Petitioner/Appellant,	)
	)
	)
vs.	)
	)
PATRICIA B. HODGSON,	)
	)CASE
Respondent/Appellee.	)No.____

PETITION

Comes now Elizabeth Jane Fasse, Petitioner herein by and through her counsel and respectfully files her Petition pursuant to O.C.G.A. Section 5-6-35, respectfully showing as follows:

1.

The errors to be enumerated on Appeal are as follows:

(i) The trial court erred in not ruling that Fulton Superior Court Local Rule 1000 violates the due process clause of the United States and Georgia Constitutions in that the methods of publishing the award of the arbitrators (by posting a copy of same on a bulletin board outside the Court Administrator's Office and keeping a copy of same in the Office of Civil Arbitration Case file) are insufficient to give such notice of the award as is required by the said due process clause.

2.

The Supreme Court has jurisdiction of this case on Appeal pursuant to Article

6, Section 6, Paragraph II of the Georgia Constitution.

3.

The Order being appeaLed is the Order of the Honorable Clarence Cooper, Judge, Fulton Superior Court, entered September 28, 1989, denying Petitioner's Motion to Set Aside Judgment.

4.

This case is a companion case to Susan Fasse vs. Patricia B. Hodgson, Supreme Court of Georgia Case No. S89D0617, in which Application for Discretionary Appeal was filed on September 27, 1989.

5.

Petitioner attaches hereto as Exhibit "E" and incorporates herein by reference the said Application for

Discretionary Appeal filed in said Case No. S89D0617.

6.

Attached hereto and made a part hereof as Exhibits are the following:

(i) Exhibit "A" - Copy of Order appealed.

(ii) Exhibit "B" - Copy of Motion to Set Aside Judgement and Brief in Support Thereof.

(iii) Exhibit "C" - Fulton Superior Court Local Rule 1000 (14).

(iv) Exhibit "D" - Copy of Order consolidating Susan Fasse vs. Patricia Hodgson, Fulton Superior Court Case No. D-14463 with Elizabeth Jane Fasse v. Patricia Hodgson, Fulton Superior Court Case no. D-26523.

Wherefore Petitioner prays that her Petition herein be granted and that the Order appealed be reversed.

DAVID N. LEVINE, P.C.

_____

David N. Levine
Attorney for Petitioner/Appellant
GA Bar No. 448400

5775 C Peachtree Dunwoody Rd.
Suite 200
Atlanta, GA 30342
(404) 256-9444

EXHIBIT "A"
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ELIZABETH JANE FASSE	)
	)
Plaintiff,	)
	)
	)CIVIL
vs.	)ACTION
	)FILE
PATRICIA B. HODGSON,	)NO
	)D-26523
Defendant	)

ORDER

Plaintiff's Motion to Set Aside Judgment came before the Court for consideration pursuant to O.C.G.A. Section 9-11-60.

After thorough review of all matters of record, the Court hereby denies said motion.

SO ORDERED this 26th day of Sept., 1989.

_____
JUDGE CLARENCE COOPER, Fulton Superior Court, A.J.C.

EXHIBIT "B"
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ELIZABETH JANE FASSE	)
	)
Plaintiff	)CIVIL
	)ACTION
	)FILE NO.
vs.	)D-26523
	)
PATRICIA B. HODGSON,	)
	)
Defendant.	)

MOTION TO SET ASIDE JUDGEMENT
AND BRIEF IN SUPPORT THEREOF

Comes now Elizabeth Jane Fasse, Plaintiff herein, by and through her counsel and respectfully moves this Court pursuant to O.C.G.A. Section 9-11-60 to set aside the judgment entered against her herein on or about the 6th of June, 1988.

In support of her Motion to Set Aside Judgment, Plaintiff shows that such judgment followed an award by

arbitrators pursuant to Local Rule 1000 of this Court. Plaintiff contends that said Local Rule 1000 violates the due process clause of the Constitutions of the United States of America and the State of Georgia and that such judgment should therefore be set aside.

Plaintiff adopts and incorporates herein by reference the Motion to Set Aside Judgment and Brief in Support of Motion to Set Aside Judgement filed by Defendant Susan Fasse in Case No. D-14463, which case has been consolidated with the instant case pursuant to previous order of this Court.

Wherefore, Plaintiff prays that the Judgment previously entered herein against her be set aside.

_____

David N. Levine
Ga Bar No. 448400
Attorney for Plaintiff

EXHIBIT "C"

13.

Arbitration hearings are intended to be brief evidentiary outlines of the case and not formal trials. Each side will be limited to a five (5) minute opening statement, unless there is a conflict of interest between the parties of such side, in which event each party with a conflict of interest may make a separate opening of five (5) minutes. At the discretion of the panel, testimony may be admitted into evidence by way of summarization by the attorney, if the witness is made available for examination. Affidavits, depositions, or portions of depositions may also be admitted into evidence as appropriate. Witnesses may be

subpoenaed as they would be to a trial. Closing argument shall be fifteen (15) minutes per side, unless there is a conflict of interest between the parties of such side, in which event such party with a conflict of interest may make a separate argument of ten (10) minutes. In the event that a party fails to appear, argument will be heard and evidence will be received from those parties appearing. Parties are encouraged to be present.

14.

At the close of the arbitration hearing, the arbitrators shall confer and return a written award for one side or the other which shows the damages, if any awarded, and which shows any dissent. A simple majority of the arbitrators is required to return an

award. The award is published to the parties, and the written award filed with the Court Administrator or his designee on the day of the hearing. No written findings of fact and conclusions of law are required.

15.

Arbitration hearings are not officially reported; counsel, at his or her own expense, may engage a private court reporter to record the proceedings.

16.

Any party may file a demand for trial within thirty (30) days of the filing of the arbitration award with the Court Administrator or his designee who shall make a notation and entry of the date of filing the award and of the trial demand; the demand for trial shall

contain the style of the case, the case number and a demand for jury or non-jury trial. Filing such demand for trial will entitle all parties to a de novo trial of all issues of fact or of law which were raised or could be raised in the arbitration hearing; such case will be tried before the judge to whom the case has been assigned in the ordinary procedure and course of time as if no arbitration hearing had been held provided, however, that testimony at the arbitration hearing may be used for any lawful purpose. Arbitration proceedings shall not delay or impede the normal trial of such case.

EXHIBIT "D"
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SUSAN FASSE Plaintiff	))Civil)Action)D-14463
vs.	)
PATRICIA B. HODGSON, Defendant	)

Consolidated with captioned Cases.
Formerly MO-1380, now as counter-claim
D-14463

ELIZABETH JANE FASSE Plaintiff	)Civil)Action
vs.	)D-26523
PATRICIA B. HODGSON, Defendant	)

Consolidated with captioned Cases.

PATRICIA B. HODGSON, Plaintiff, Counter-Defendant	)))Civil
vs.	)Action
SUSAN FASSE Defendant, Counter-Plaintiff	)D-14463)

Consolidated with captioned Cases.
MO-1360, now as
counter-claim in D-14463.

ORDER OF CONSOLIDATION

Coming on upon MOTION FOR CONSOLIDATION of Defendant and counter-plaintiff, SUSAN FASSE and Plaintiff, ELIZABETH JANE FASSE, jointly and severally for this court's order of consolidation nunc pro tunc to October 02, 1986, of the above captioned cases for trial and further proceedings before this court.

IT IS SO ORDERED.

ENTERED_____

Judge of the Superior Court

DATED: 20 Nov. 1987

Nunc pro tunc to October 02, 1986.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PATRICIA B. HODGSON,	)
	)
Plaintiff,	)
	)
	)CIVIL
vs.	)ACTION
	)FILE
SUSAN FASSE,	)NO.
	)D-14463
Defendant.	)

ORDER

Defendant's Motion to Set Aside came before the Court for consideration pursuant to O.C.G.A. Section 9-11-60.

Having heard argument of counsel and after thorough review of the respective briefs, the motion is hereby denied.

SO ORDERED, this 26th day of August, 1989.

_____
Judge Clarence Cooper
Fulton Superior Court, A.J.C.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PATRICIA B. HODGSON,	)
	)
Plaintiff,	)
	)
	)CIVIL .
vs.	)ACTION
	)FILE
SUSAN FASSE,	)NO.
	)D-14463
Defendant.	)

MOTION TO SET ASIDE JUDGMENT

Comes now SUSAN FASSE, Defendant herein, by and through her attorney and pursuant to O.C.G.A. Section 9-11-60 files her Motion to Set Aside the Judgment entered against her herein on March 7, 1989, respectfully showing the Court as follows:

1.

The within Motion to Set Aside is based upon nonamendable defects which appear upon the facts of the record and

the fraud, accident or mistake of the adverse party unmixed with the negligence or fault of the movant, as is set forth below.

2.

The within Motion to Set Aside is bought within three (3) years from the entry of said judgment.

3.

That on or about August 4, 1988 an Order for Arbitration was entered herein and a copy of such order sent to Defendant's attorney of record.

4.

That on or about August 29, 1988 a notice of the scheduling of such case for arbitration on October 21, 1988 was sent by the Office of Civil Arbitration to Thomas V. Cassidy, attorney of record for Defendant.

5.

That on or about October 17, 1988 Defendant, by her said counsel of record, filed her Motion for Continuance from such arbitration, wherein such counsel stated that Defendant was providentially prevented from attending such hearing and that counsel could not safely go to trial without Defendant's presence, all as required by O.C.G.A. Section 9-10-154, a copy of such Motion for Continuance being attached hereto as Exhibit "A" and made a part hereof.

6.

That on October 20, 1988 the Honorable Clarence Cooper, Judge, entered an Order granting such Motion for Continuance and re-setting the case for arbitration on February 3, 1989, a

copy of such Order being attached hereto as Exhibit "B" and made a part hereof.

7.

That a copy of such Order was sent to Defendant's counsel of record by the Office of Civil Arbitration of this Court on or about October 26, 1989, a copy of the envelope containing such Order being attached hereto as Exhibit "C" and made a part hereof.

8.

That on January 31, 1989 Defendant by her said counsel of record, filed her Motion for Continuance from such arbitration scheduled for February 3, 1989, wherein such counsel stated that Defendant was providentially prevented from attending such hearing and that counsel could not safely go to trial

without her presence, all as required by O.C.G.A. Section 9-10-154. An appropriate affidavit dated January 30, 1989 from Defendant's doctor was also attached to such Motion for Continuance wherein such doctor stated that defendant was examined and evaluated on January 23, 1989 and is "physically and medically unable to participate in any court proceedings. . .until further notice from this office or myself as her treating physician." A copy of said Motion and Affidavit is attached hereto as Exhibit "D" and made a part hereof.

9.

That pursuant to O.C.G.A. Section 9-10-154 counsel also stated that Defendant's continuances had not been exhausted.

10.

Plaintiff did not oppose such Motion for Continuance.

11.

That despite the requirement of O.C.G.A. Section 9-10-154 that a continuance shall be granted and despite the lack of an objection by Plaintiff to the Motion, no Order was entered herein granting or denying such Motion for Continuance.

12.

That on or about February 1, 1989, Defendant's counsel called the Office of Civil Arbitration and was advised that the arbitration scheduled for February 3, 1989 had been continued and that same would be re-set.

13.

That despite the existence of said unobjected to Motion for Continuance and without a ruling thereon, the arbitration was held on February 3, 1989.

14.

Defendant was providentially prevented from attending such arbitration and was unaware that such hearing was in fact being held.

15.

Unbeknownst to Defendant, the arbitrators awarded Plaintiff the amount of $51,181.25 and $10,795.24 attorney's fees.

16.

That neither Defendant nor her counsel of record were ever sent notice of such award as is set forth in the

Affidavits attached hereto as Exhibits "E", "F" and "G".

17.

That Local Rule 1000(14) of this Court requires that such award be published to the parties.

18.

In accordance with the Affidavit of Kimberly Warden, Arbitration Administrator, attached hereto as Exhibit "H" and made a part hereof, the method of publication of such award to the parties consists solely of the following:

(i) Posting same on a bulletin board outside the Court Administrator's Office on the seventh (7th) floor of the Fulton County Court House.

(ii) Keeping a copy of same in the case file in the Office of Civil Arbitration.

19.

That such Local Rule 1000(14) and the manner in which such award was published as above set forth fail to meet the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America and Article 1 of the Constitution of the State of Georgia.

20.

That such method of publication of the award to the parties as set forth in said Local Rule 1000(14) does not provide notice reasonably calculated to apprise Defendant of such award and to afford her the opportunity to timely

present her objections thereto by demanding a trial, as required by the said Constitutions of the United States of America and the State of Georgia.

21.

That no notice of such award was sent by mail or otherwise to the parties or to counsel of record.

22.

That as a result thereof Defendant was not given proper notice of such award and as unaware of the existence of same.

23.

That on or about March 7, 1989, without Motion or notice to Defendant or her counsel of record, a proposed judgment was presented to the Honorable Clarence Cooper, Judge by counsel for Plaintiff, which judgment in the total

amount of $61,976.49 against Defendant was signed by Judge Cooper on that day, a copy of same being attached hereto as Exhibit "I" and made a part hereof.

24.

That a copy of such Judgment was not sent to defendant or her counsel as required by O.C.G.A. Section 9-11-5, thus further depriving defendant of an opportunity to protect her interests.

25.

That all of the foregoing constitute nonamendable defects appearing on the face of the record herein and fraud, accident or mistake or the acts of the adverse party unmixed with the negligence or fault of Defendant.

26.

That despite such arbitration award in derogation of the said due process

clause as above set forth, and the procuring of said judgment by Plaintiff without notice to Defendant or her counsel of record, the within case appeared scheduled for trial on April 11, 1989 as published in the Fulton Daily Report.

27.

Defendant, not knowing of the existence of said judgement and still being providentially prevented from appearing for trial, on April 4, 1989 filed her Motion for Continuance from said April 11, 1989, trial calendar, a copy of such Motion being attached hereto as Exhibit "J" and made a part hereof.

28.

That no order has ever been entered on such Motion for Continuance.

29.

That the original judgment herein signed by Judge Clarence Cooper has not been in the Court's file at all relevant times herein thus additionally preventing Defendant from having knowledge of same.

30.

That as a result of the set forth facts Defendant is entitled to have said judgment set aside.

31.

That as a result of the entry of said judgment without notice and in violation of said due process cause, Defendant has had her credit rating severely and irreparably damaged and has had credit applications denied.

32.

That a fi. fa. was issued herein on March 13, 1989.

33.

Plaintiff has filed at least seven (7) garnishment actions seeking to enforce such wrongfully obtained judgment all to the irreparable harm, damage and injury of Defendant.

34.

That as a result of the foregoing Defendant has suffered and continues to suffer irreparable harm, damage and injury pending a ruling on the within Motion to Set Aside Judgment, for which she has no adequate remedy at law.

35.

That Plaintiff should be restrained and enjoined from prosecuting such pending garnishment actions and from taking any other action of any kind,

nature or description seeking to enforce such wrongfully obtained judgment pending a hearing hereon and further order of this Court.

WHEREFORE Defendant prays as follows:

a) That a Rule Nisi issue requiring Plaintiff to show cause why Defendant should not have the relief sought herein.

b) That Plaintiff be restrained and enjoined from taking any action to enforce said Judgment pending a ruling on the within Motion.

c) That all pending garnishment actions already filed by Plaintiff be stayed pending a ruling on the within Motion.

d) That the Judgment against Defendant herein be set aside.

e) That Defendant have such other and further relief as the Court shall deem just, equitable and proper.

DAVID N. LEVINE, P.C.

_____
David N. Levine, Attorney for
Defendant Susan Fasse
Ga. Bar No. 448400

EXHIBIT "A"

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA
ARBITRATION
&
CIVIL LITIGATIONS

SUSAN FASSE Plaintiff	))CiviL)Action)D-14463
vs.	)
PATRICIA B. HODGSON, Defendant	)

Consolidated with captioned Cases.
Formerly MO-1360, now as counter-claim D-14463

ELIZABETH JANE FASSE Plaintiff	)Civil)Action
vs.	)D-26523
PATRICIA B. HODGSON, Defendant	)

Consolidated with captioned Cases.

PATRICIA B. HODGSON, Plaintiff, Counter-Defendant	))
vs.	)Civil)Action
SUSAN FASSE Defendant, Counter-Plaintiff	)D-14463)

MO-1360, now as counter-claim in D-14463.

MOTION FOR CONTINUANCE
ARBITRATION AND CIVIL LITIGATIONS

Defendant and counter-plaintiff SUSAN FASSE by ROBERT A. MEIER IV and THOMAS V. CASSIDY her attorneys respectfully petitions the court and the arbitration panel for its order of continuance of one or all of the above captioned consolidated matters at least until next term court and arbitration term upon the grounds of and as grounds for

1. That SUSAN FASSE a party is providentially prevented from attending the trial and/or arbitration hearing of the case[s] and the undersigned counsel for the party states he cannot safely go to trial without the presence of the absent party by reason of her illness and medical doctor's orders and directions, and further it is stated

and represented that the continuances of the party SUSAN FASSE have not been exhausted.

2. In support of same there is here attached the medical certificate of Dr. John A. Shull, M.D., 929 Spring Creek Road, Suite #203, Chattanooga, Tennessee 37412 dated September 21, 1988 [EXHIBIT "A"] supported by affidavit. [EXHIBIT "B"].

SUSAN FASSE, defendant
and counter-plaintiff

By:_____
one of her attorneys so certifies.

ATTORNEYS FOR SUSAN FASSE
ROBERT A. MEIER, IV and:
THOMAS V. CASSIDY
2648 Sharondale Circle, N.E.
Atlanta, GA 30305
(404) 237-0494

EXHIBIT "A"

JOHN A. SHULL, M.D.
OBSTETRICS AND GYNECOLOGY
929 Spring Creek Road
Suite 203
Chattanooga, TN 37412
(615) 855-0357

Sept. 21, 1988

TO WHOM IT MAY CONCERN

Ms. Susan Jane Fasse of Atlanta, Georgia is under my treatment and care for diagnosed pathology and will be for an unforeseeable period into the future.

Due to this she is unable to physically or medically participate in any court proceedings or depositions until further notice from this office and myself.

Yours very truly,

John A. Shull, M.D.

STATE OF GEORGIA
COUNTY OF FULTON

AFFIDAVIT

SUSAN JANE FASSE, affiant being of lawful age deposes and states upon her oath that the matters contained in the one (1) page medical report of Dr. John A. Shull, M.D., 929 Spring Creek Road, Suite 203, Chattanooga, Tennessee 372412 (615) 855-0357 dated September 21, 1988 and written on the letter head stationary of Dr. Shull are of her own personal knowledge, and what was related to her by Dr. Shull, M.D. as his patient true in substance and in fact.

_____
SUSAN JANE FASSE, affiant
Sworn to and subscribed
before me this _____
day of _____, 1989.

_____
Notary Public

EXHIBIT "B"
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PAT HODGSON	)
	)CIVIL
Plaintiff,	)ACTION
	)FILE
vs.	)D-14463
	)
SUSAN FASSE	)
	)
Defendant.	)

ORDER

This case having been assigned to the Civil Arbitration Program, and having been scheduled for the arbitration hearing, and, pursuant to Local Rule 1000 of this Court, a legal reason having been given or good cause having been shown, this arbitration hearing is reset from October 21, 1988 and is hereby continued until February 3, 1989 at 11:30 a.m.

SO ORDERED, this 20th day of October, 1988.

Clarence Cooper, Judge
Fulton County Superior Court

EXHIBIT "D"
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA
ARBITRATION
&
CIVIL LITIGATIONS

SUSAN FASSE Plaintiff	))CiviL)Action)D-14463
vs.	)
PATRICIA B. HODGSON, Defendant	)

Consolidated with captioned Cases.
Formerly MO-1360, now as counter-claim
D-14463

ELIZABETH JANE FASSE Plaintiff vs. PATRICIA B. HODGSON, Defendant	)Civil)Action)D-26523)

Consolidated with captioned Cases.

PATRICIA B. HODGSON, Plaintiff, Counter-Defendant vs. SUSAN FASSE Defendant, Counter-Plaintiff	)))Civil)Action)D-14463)

MO-1360, now as counter-claim in D-14463.

MOTION FOR CONTINUANCE
ARBITRATION AND CIVIL LITIGATIONS

Defendant and counter-plaintiff SUSAN FASSE by ROBERT A. MEIER IV and THOMAS V. CASSIDY her attorneys respectfully petitions the court and the arbitration panel for its order of continuance of all of the above captioned consolidated matters a least until next term court and arbitration term upon the grounds of and as grounds for:

1. That SUSAN FASSE a party is providentially prevented from attending the trial and/or arbitration hearing of the consolidated by court order cases and the undersigned counsel for the party states he cannot safely go to trial without the presence of the absent party by reason of her illness and medical doctor's orders and

directions, and further it is stated and represented that the continuances of the party SUSAN FASSE have not been exhausted.

2. In support of same there is here attached the affidavit of Dr. John A. Shull, M.D., 929 Spring Creek Road, Suite #203, Chattanooga, Tennessee 37412 dated January 30, 1989, who is defendant and counter-plaintiff's Susan J. Fasse, treating physician (Exhibit "A") and further supported by the affidavit of Susan J. Fasse, defendant and counter-plaintiff (Exhibit "B").

3. That this motion is made in good faith and not for purpose of unwarranted delay.

4. That these matters are set before the ARBITRATION PANEL as the ninth (9th) cases scheduled to commence at

11:30 a.m. on Friday, February 03, 1989.

SUSAN FASSE, defendant
and counter-plaintiff.

BY:_____
one of her attorneys so certifies.

ATTORNEYS FOR SUSAN FASSE

ROBERT A. MEIER, IV and
THOMAS V. CASSIDY
2648 Sharondale Circle, N.E.
Atlanta, GA 30305
(404) 237-0494

JOHN A. SHULL, M.D.
OBSTETRICS AND GYNECOLOGY
929 Spring Creek Road
Suite 203
Chattanooga,-TN 37412
(615) 855-0357

January 30, 1989

Affidavit

To Whom It May Concern:

This is in supplement to my September 21, 1988, "To Whom It May Concern" letter concerning my patient, Ms. Susan J. Fasse of Atlanta, Georgia.

Ms. Fasse of Atlanta, Georgia, continues under my treatment and care for diagnosed pathology and will be for an unforeseeable period into the future. Her diagnosed pathology although acute is continuing in nature.

Ms. Fasse did, indeed, enter as an inpatient, Humana East Ridge Hospital, Chattanooga, Tennessee, on December 2,

1988, where I performed specialized/general surgery upon her in connection with her diagnosed pathologies. Her conditions of ill-being continue. Upon my physician order, she is presently on medication and will be for an unforeseeable period.

I saw Ms. Fasse in my office for examination and evaluation on January 23, 1989, and pursuant to this it is my recommendation that Ms. Fasse is in further need of inpatient surgery. Upon my direction she will see in consultation with myself Dr. C.Y. Liu, M.D., 4308 Brainerd Rd., Chattanooga, Tennessee (37411) a 10:30 a.m., Feb. 8, 1989. My patient's, Ms. Fasse, surgery will be carried out within the next thirty to sixty days.

With a view to the foregoing, Mrs. Susan Fasse is presently permanently partially disabled and physically and medically unable to participate in any court proceedings or depositions until further notice from this office or myself as her treating physician.

Yours very truly,

John A. Shull, M.D.

Subscribed and sworn to before me this 30th day of January, 1989.

Exhibit "A"

STATE OF GEORGIA)

COUNTY OF FULTON)

AFFIDAVIT

SUSAN JANE FASSE, affiant, being of lawful age deposes and states upon her oath that the matters contained in the attached and verified affidavit medical report of Dr. John A. Shull, M.D. 929 Spring Creek Road, Suite 203, Chattanooga, Tennessee 37412, (615) 855-0357 dated January 30, 1989 and written on the letter head stationary of Dr. Shull are of her own personal knowledge and what was related to her by Dr. Shull, M.D. as his patient, true in substance and in fact, further, affiant states that the matters contained in her attached Motion For Continuance are true in substance and in fact; FURTHER AFFIANT STATES: that

the grounds for this continuance are providential in nature due to the physical medical condition of pathology of the affiant and not within the control of the affiant herein.

_____

SUSAN JANE FASSE, affiant.

Subscribed and sworn to before me this 30 day of Jan., 1989
SEAL

EXHIBIT "B"

EXHIBIT "E"

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PATRICIA B. HODGSON,	)
	)
Plaintiff,	)
	)
	) CIVIL
vs.	) ACTION
	) FILE
SUSAN FASSE,	) NO.
	) D-14463
Defendant.	)

AFFIDAVIT

Personally appeared before me the undersigned authority duly authorized to administer oaths SUSAN FASSE who after being sworn, on oath deposes and states as follows:

That she is the Defendant in the within action.

That inpatient surgery was performed on her by John A. Shull, M.D. on December 2, 1988 in Chattanooga, Tennessee.

That she was examined by Dr. Shull in his office on January 23, 1989.

That the facts contained in her Motion for Continuance and her Affidavit filed herein on January 31, 1989 were true and correct.

That she was physically and medically unable to attend or participate in any legal proceedings to be held on February 3, 1989 herein.

That at no time prior to June 10, 1989 did she receive any notice of the award of the arbitrators or the judgment granted herein.

That she first learned of such judgment on or about June 10, 1989 when she was denied credit by Georgia Federal Bank.

That the allegations contained in her Motion to Set Aside Judgement are true and correct.

That this Affidavit is freely given and may be used for any lawful purpose.

This 1st day of August, 1989.

_____
Susan Fasse

Sworn to and subscribed
before me this 1st day of August, 1989.

EXHIBIT "F"

GEORGIA FULTON COUNTY

Personally appeared before the undersigned authority duly authorized to administer oaths

ROBERT A. MEIER, IV. ESQ.

who after being sworn on oath deposes and states as follows:

That he is a counsel of record for Defendant Susan Fasse in Case No. D-14463, Fulton Superior Court.

That he has been a counsel of record in such case for Defendant at all times from October 1, 1988 through the present date.

That at no time did he receive notice from the Court, the Office of Civil Arbitration or from opposing counsel of any arbitration award herein, the

presenting of a proposed judgment signed by Judge Cooper herein.

This Affidavit is made from personal knowledge and may be used for any lawful purpose.

This 18 day of July, 1989.

Sworn to and subscribed before me this 21 day of July, 1989

_____

ROBERT A MEIER, IV

EXHIBIT "G"

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PATRICIA B. HODGSON,	)
	)
Plaintiff,	)
	)
	)CIVIL
vs.	)ACTION
	)FILE
SUSAN FASSE,	)NO.
	)D-14463
Defendant.	)

GEORGIA FULTON COUNTY

Personally appeared before me the undersigned authority duly authorized to administer oaths THOMAS V. CASSIDY who after being sworn, on oath deposes and states as follows:

That he is a counsel of record for Defendant Susan Fasse in the within case.

That he has been a counsel of record for said Defendant since January 14,

1988.

That on or about February 1, 1989 he called the Office of Civil Arbitration and was advised that the Motion for Continuance filed January 31, 1989 had been received and that the arbitration scheduled for February 3, 1989 had been continued and would be re-set to another date.

That at no time did he receive Notice from the Court, the Office of Civil Arbitration or from opposing counsel for any arbitration award herein, a Motion for Judgment, the presenting of a proposed judgment to Judge Clarence Cooper or a copy of any such judgment signed by Judge Cooper herein.

That between March 7, 1989 and June 20, 1989 the said judgment dated March 7, 1989 against defendant Susan Fasse

was not in the case file in the office of the Clerk of the Fulton Superior Court.

That this Affidavit is made from personal knowledge and may be used for any lawful purpose.

THOMAS V. CASSIDY

Sworn to and subscribed before me this 1st day of August 1989.

EXHIBIT "H"

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PATRICIA B. HODGSON,	)
	)
Plaintiff,	)
	)
	) CIVIL
vs.	) ACTION
	) FILE
SUSAN FASSE,	) NO.
	) D-14463
Defendant.	)

GEORGIA, FULTON COUNTY

Personally appeared before me the undersigned authority duly authorized to administer oaths KIMBERLY A. WARDEN who after being sworn on oath deposes and states as follows:

That she is the Arbitration Administrator of the Office of Civil Arbitration, Fulton Superior Court.

That Local Rule 1000 (14) of the Fulton Superior Court provides in part

that the award (of the arbitrators) be published to the parties.

That the method by which the award of the arbitrators is published to the parties consists solely of:

i) Posting such award on a bulletin board outside the Court Administrator's office on the seventh (7th) floor of the Fulton County Courthouse; and

ii) Keeping a copy of same in the case file in the Office of Civil Arbitration and copies available for all parties.

iii) That this has been the policy of the office for three years.

That the award of the arbitrators is not mailed to counsel of record or the parties in a case. That such award is

not served on the parties or counsel of record by the Sheriff's Department.

That this Affidavit is given from personal knowledge and may be used for any lawful purpose.

This 31 day of July, 1989.

Sworn to and subscribed
before me this 31
day of July, 1989.

_____
Notary Public

_____
KIMBERLY A. WARDEN

EXHIBIT "I"

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PATRICIA B. HODGSON,	)
	)
Plaintiff,	)
	)
	)CIVIL
vs.	)ACTION
	)FILE
SUSAN FASSE,	)NO.
	)D-14463
Defendant.	)

JUDGMENT

The above-styled case having come on for civil arbitration pursuant to Local Rule 1000 of this Court on February 3, 1989, and an award of the arbitrators having been entered that day for the Plaintiff in the amount of Fifty-One Thousand One Hundred Eighty-One and 25/100 ($51,181.25) Dollars,, and Ten Thousand Seven Hundred Ninety-Five and 24/100 ($10,795.24) Dollars attorneys'

fees, as evidenced by the Award attached hereto as Exhibit "A" and incorporated herein by reference and it appearing that thirty (30) days have elapsed and neither party has filed a demand for trial as required by the Local Rules of this Court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff have judgment by consent against the Defendant in the sum of Fifty-One Thousand One Hundred Eighty-One and 25/100 ($51,181.25) Dollars, and Ten Thousand Seven Hundred Ninety-Five and 24/100 ($10,795.24) Dollars, attorneys' fees, together with costs.

SO ORDERED, this 7 day of March 1989.

CLARENCE COOPER
JUDGE, SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT

EXHIBIT "J"

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA
ARBITRATION
&
CIVIL LITIGATIONS

SUSAN FASSE Plaintiff	))CiviL)Action)D-14463
vs.	)
PATRICIA B. HODGSON, Defendant	)

Consolidated with captioned Cases.
Formerly MO-1360, now as counter-claim
D-14463

ELIZABETH JANE FASSE Plaintiff	)Civil)Action
vs. PATRICIA B. HODGSON, Defendant	)D-26523)

Consolidated with captioned Cases.

PATRICIA B. HODGSON, Plaintiff, Counter-Defendant	)))Civil
vs. SUSAN FASSE Defendant, Counter-Plaintiff	)Action)D-14463))

MO-1360, now as counter-claim in D-14463.

MOTION FOR CONTINUANCE
CIVIL LITIGATIONS
JURY TRIAL CALENDAR

Defendant and counter-plaintiff SUSAN FASSE by ROBERT A. MEIER IV and THOMAS V. CASSIDY her attorneys respectfully petitions the court for its order of continuance of the above captioned consolidated matters which are set upon this court's jury trial calendar scheduled to commence April 11, 1989 upon the grounds of and as grounds for:

1. That SUSAN FASSE a party is providentially prevented from attending the jury trial of the consolidated by court order cases and the undersigned counsel for the party states he cannot safely go to trial without the presence of the absent party by reason of her illness and medical doctor's orders and directions, and further it is stated

and represented that the continuances of the party SUSAN FASSE have not been exhausted.

2. In support of same there is here attached the affidavit of Dr. John A. Shull, M.D., 929 Spring Creek Road, Suite #203, Chattanooga, Tennessee 37412 dated April 03, 1989, who is defendant and counter-plaintiff's Susan J. Fasse, treating physician (EXHIBIT "1", & A, B & C).

3. That this motion is made in good faith, upon good grounds shown and not for purpose of unwarranted delay.

4. That these matters are set before the court as cases scheduled to commence by trial by jury on April 11, 1989.

SUSAN FASSE, defendant
and counter-plaintiff.

BY_____
one of her attorneys so certifies.

ATTORNEYS FOR SUSAN FASSE:

ROBERT A. MEIER IV, and
THOMAS V. CASSIDY
2648 Sharondale Circle, N.E.
Atlanta, Georgia 30305
(404) 237-0494

EXHIBIT #1

JOHN A. SHULL, M.D.
OBSTETRICS AND GYNECOLOGY
929 Spring Creek Road
Suite 203
Chattanooga, TN 37412
(615) 855-0357

April 3, 1989

Affidavit

To Whom It May Concern:

This affidavit, narrative-letter medical report concerning my patient, Ms. Susan J. Fasse of Atlanta, Georgia is in supplement to my affidavit narrative medical reports of September 21, 1988, January 30, 1989 and March 1, 1989, concerning this patient which are here attached as Exhibits "A", "B" and "C" and which I incorporate by reference herein at this time and the contents of which I here and now reaffirm, reverify and subscribe to

once again.

On this date of April 3rd, 1989 and in medical consultation with Dr. C.Y. Liu, M.D., I conducted a physical and medical examination of Ms. Susan Fasse post surgically at my office in Chattanooga, Tennessee. The patient is progressing uneventfully from her most recent surgery of February 22, 1989 and in her recuperation is strictly following my medical recommendations to her. Ms. Fasse's prognosis is guarded.

In my March 1, 1989 verified narrative medical report I stated in behalf of myself and Ms. Fasse's treating chief surgeon, Dr. C.Y. Liu, M.D., that

> She (Susan J. Fasse) is presently under acute post surgical treatment in which she is only permitted

sedentary activities, and will be permanently and totally disabled as a result of same for at least the next eight (8) weeks, and Susan J. Fasse is physically and medically unable to participate in any court proceedings, depositions or brief writings for that period of time or thereafter until further notice from this office or myself and/or Dr. C.Y. Liu, M.D.

This is still my and Dr. Liu's opinion, however, we do extend this period of permanent partial disability until at least June 1, 1989. I will see the patient in the meantime and provide any necessary verified narrative medical reports requested of myself as will Dr. C.. Liu, M.D.

Yours very truly,

John A. Shull, M.D.

Subscribed and sworn to before me this
30th day of January, 1989.

EXHIBIT "A"

JOHN A. SHULL, M.D.
OBSTETRICS AND GYNECOLOGY
929 Spring Creek Road
Suite 203
Chattanooga, TN 37412
(615) 855-0357

September 21, 1988

TO WHOM IT MAY CONCERN:

Ms. Susan Jane Fasse of Atlanta, Georgia is under my treatment and care for diagnosed pathology and will be for an unforeseeable period into the future.

Due to this she is unable to physically or medically participate in any court proceedings or depositions until further notice from this office and myself.

Yours very truly,

John A. Shull, M.D.

EXHIBIT "B"

JOHN A. SHULL, M.D.
OBSTETRICS AND GYNECOLOGY
929 Spring Creek Road
Suite 203
Chattanooga, TN 37412
(615) 855-0357

March 1, 1989

Affidavit

To Whom It May Concern:

This affidavit, narrative-letter medical report concerning my patient, Ms. Susan J. Fasse of Atlanta, Georgia, is in supplement to my affidavit narrative medical report of January 30, 1989, concerning this patient which is here attached as Exhibit "A", and which I incorporate by reference herein at this time and the contents of which I here and now reaffirm, reverify and now subscribe to once again.

Pursuant to my medical recommendation as contained in paragraph four (4) of my attached affidavit-letter of January 30, 1989, and that of Ms. Fasse's co-treating physician and surgeon, Dr. C.Y. Liu, M.D., 4308 Brainerd Road, Chattanooga, Tennessee 37411, Susan J. Fasse did undergo major and general surgery under general anesthetic for in excess of four (4) hours by Dr. Liu and myself while an inpatient at Humana Hospital East Ridge, Chattanooga, Tennessee on February 22, 1989. This surgery was in the nature of a pelvoscopy within her abdominal and pelvic cavities during which procedures tumors were surgically removed from those portions of her anatomy. It is medically likely that she will within the near future require additional

medical surgery at these or contiguous sites.

She is presently under acute post surgical treatment in which she is only permitted sedentary activities, and will be permanently and totally disabled as a result of same for at least the next eight (8) weeks, and Susan J. Fasse is physically and medically unable to participate in any court proceedings depositions or brief writings for that period of time or thereafter until further notice from this office or myself and/or Dr. C.Y. Liu, M.D.

Yours very truly,

John A. Shull, M.D.

Subscribed and sworn to before me this 30th day of January, 1989.

EXHIBIT "C"

JOHN A. SHULL, M.D.
OBSTETRICS AND GYNECOLOGY
929 Spring Creek Road
Suite 203
Chattanooga, TN 37412
(615) 855-0357

January 30, 1989

Affidavit

To Whom It May Concern:

This is in supplement to my September 21, 1988, "To Whom It May Concern" letter concerning my patient, Ms. Susan J. Fasse of Atlanta, Georgia.

Ms. Fasse of Atlanta, Georgia continues under my treatment and care for diagnosed pathology and will be for an unforeseeable period into the future. Her diagnosed pathology although acute is continuing in nature.

Ms. Fasse did, indeed, enter as an inpatient, Humana East Ridge Hospital,

Chattanooga, Tennessee, on December 2, 1988, where I performed specialized/general surgery upon her in connection with her diagnosed pathologies. Her conditions of ill-being continue. Upon my physician order, she is presently on medication and will be for an unforeseeable period.

I saw Ms. Fasse in my office for examination and evaluation on January 23, 1989, and pursuant to this it is my recommendation that Ms. Fasse is in further need of inpatient surgery. Upon my direction she will see in consultation with myself Dr. C.Y. Liu, M.D., 4308 Brainerd Road, Chattanooga, Tennessee 37411, at 10:30 a.m., Feb. 8, 1989. My patient's, Ms. Fasse, surgery

will be carried out within the next thirty to sixty days.

With a view to the foregoing, Mrs. Susan Fasse is presently permanently partially disabled and physically and medically unable to participate in any court proceedings or depositions until further notice from this office or myself as her treating physician.

Yours very truly,

John A. Shull, M.D.

Subscribed and sworn to before me this 30th day of January, 1989.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PATRICIA B. HODGSON,	)
	)
Plaintiff,	)
	)
	)CIVIL
vs.	)ACTION
	)FILE
SUSAN FASSE,	)NO.
	)D-14463
Defendant.	)

BRIEF IN SUPPORT OF
MOTION TO SET ASIDE JUDGMENT

Comes now SUSAN FASSE, defendant herein, by and through her counsel and files her Brief In Support of Motion To Set Aside Judgment, respectfully showing the Court as follows:

FACTS

The facts herein are quiet simple and direct.

On August 4, 1988 the Honorable Clarence Cooper, Judge, Fulton County Superior Court entered an order for

arbitration herein. A copy of such order was sent to Defendant's counsel of record. The within case had already been consolidated with Case No. D-26523, styled Elizabeth Jane Fasse vs. Patricia Hodgson under a prior order of Judge Cooper; however the consolidated cases were ordered to arbitration separately from each other. Jury demands had been previously filed in both cases.

On August 29, 1988 a notice of the scheduling of such arbitration for October 21, 1988 was sent to Defendant's counsel of record.

Defendant was seriously ill and suffering from various pathologies. On October 17, 1988 she filed her Motion for Continuance from the October 21,

1988 arbitration, which Motion was not objected to by Plaintiff.

On October 20, 1988 Judge Cooper signed an order granting the continuance and on October 26, 1988 a copy of such order was sent to Defendant's counsel of record by the Office of Civil Arbitration. Such order re-set the arbitration for February 3, 1989.

Defendant was still suffering from her pathologies with further surgery being required (which was performed on February 22, 1989) and was unable by virtue hereof to attend or participate in the arbitration scheduled for February 3, 1989.

On January 31, 1989 she filed her Motion for Continuance from the February 3, 1989 arbitration, attaching

thereto her Affidavit and the Affidavit of her treating physician, which Motion was also not objected to by Plaintiff. Her counsel stated in such motion that he could not safely go to trial without her being present.

Her counsel contacted the Office of Civil Arbitration on February 1, 1989 and was told that the motion had been received, the hearing continued and that same would be re-set to another date.

No further action of record was taken on her said Motion for Continuance; however, the arbitration hearing was held on February 3, 1989 without her knowledge.

On February 3, 1989 the arbitrators awarded plaintiff the sum of $61,976.49 against defendant. NO COPY OF SUCH

AWARD WAS SENT TO DEFENDANT'S COUNSEL OR TO DEFENDANT.

Defendant therefore had no knowledge of such award and on March 7, 1989 plaintiff secured Judge Cooper's signature on a judgment awarding plaintiff $61,976.49 against defendant.

The said judgment was procured by plaintiff without the filing of a Motion for Judgment and without notice of any kind to defendant or her counsel of record in derogation of the Rules of this Court.

Local Rule 1000(14) of this Court requires that the award of the arbitrators be "published to the parties". The method of publication used by the Office of Civil Arbitration is limited to:

i) Posting such award on a bulletin board outside the Court Administrator's office on the seventh (7th) floor of the Fulton County Courthouse, and

ii) Keeping a copy of such award in the case file in the Office of Civil Arbitration.

Defendant contends that her Motion to Set Aside such judgment of March 7, 1989 should be granted pursuant to O.C.G.A. Section 9-11-60 on the following grounds:

i) Her Motion for Continuance filed on January 31, 1989, which was not objected to by Plaintiff, was required to be granted but was never ruled upon by the Court.

ii) The method of publishing the arbitration award violates the due

process clause of the Fourteenth Amendment to the United States Constitution and also violates the Constitution of the State of Georgia.

iii) A copy of the judgment was not sent by plaintiff's counsel to counsel for Defendant as required.

iv) The foregoing constitute nonamendable defects which appear on the face of the record herein and fraud, accident or mistake or the acts of the adverse party unmixed with the negligence of fault of Defendant.

ARGUMENT OF LAW

I.

THE COURT WAS REQUIRED TO GRANT DEFENDANT'S MOTION FOR CONTINUANCE

O.C.G.A. Section 9-10-154 provides as follows:

> If either party is providentially prevented from attending the trial of a case, and the counsel of the absent party will state in his place that he cannot go safely to trial without the presence of the absent party, the case shall be continued, provided that the continuances of the party have not been exhausted. (Emphasis added.)

Such statute has been the law in Georgia since at least 1863. Defendant' Motion for Continuance complied in all respects with the requirements of the statute and the Court was bound to grant her Motion. Yet, for some unexplained reason, the Court entered no ruling whatsoever on her Motion, apparently ignoring same.

Defendant contends that the existence of her said unobjected to Motion for Continuance which fully and completely complied with O.C.G.A. Section 9-10-154 and which was left unruled upon by the Court constitutes a nonamendable defect appearing on the face of the record requiring that the judgment entered herein be set aside.

II.

THE METHOD OF PUBLISHING THE AWARD OF THE ARBITRATORS VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES AND GEORGIA CONSTITUTIONS

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, as well as Article 1 of the Constitution of the State of Georgia requires that a person's interest in life, liberty or

property not be taken without due process of law.

The leading case on the issue of procedural due process is Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

At page 314 in Mullane, supra, the United States Supreme Court noted that due process requires a State to provide

> notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

See also McKee v. Hegy, 703 F.2d 479 (10th Cir.1983).

In In Re Middle Plantation of Williamsburg, Inc., Debtor, 48 B.R. 789, 798 (U.S. District Court - E.D.

Va. 1985). the United States District Court stated as follows:

> The goal of the notice requirement of procedural due process is to provide notice reasonably calculated, under circumstances, to provide an interested party with actual notice. (Emphasis added.)

The United States District Court for the Northern District of Georgia (Sidney O. Smith, Judge) in Law vs. United States Department of Agriculture, 366 F.Supp. 1233, 1238 (1973) noted as follows, citing Mullane, supra, at p. 318:

> notice must be such as is reasonably calculated to reach interested parties.

In Mullane, supra, at p. 315, the United States Supreme Court also stated as follows:

> The means employed [for giving notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

In Mullane, supra, the United States Supreme Court held that notice by publication of a notice to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the rust whose names and addresses were known. See also Mennonite Board of Missions vs. Adams, 462 U.S. 791 (1983).

In the within case the names and addresses of counsel for the parties were well known and of record. Yet

pursuant to the Affidavit of Kimberly A. Warden, Arbitration Administrator, attached to the defendant's Motion to Set Aside Judgment as Exhibit "H", the means of publishing the award to the parties does not include mailing or otherwise sending a copy of the award of the arbitrators to counsel. Such means of publication is fatally flawed as not being reasonably calculated to apprise defendant of the award and afford her an opportunity to present her objections, Mullane, supra.

Since a demand for trial must be made within thirty (30) days of the award of the arbitrators, it is mandatory hat notice of such award be given to the parties. Local Rule 1000 simply does not provide a constitutionally acceptable means to give such notice.

The methods actually employed by the Office of Civil Arbitration (posting the award on a bulletin board on the seventh (7th) floor of the Fulton County Courthouse and keeping a copy of the award in the case file) do not satisfy the requirements of due process and are not calculated to actually give such notice as is required by law.

Lastly, the Georgia Court of Appeals in Hollis vs. Tanner, 177 Ga. App. 759, 341 S.E.2d 291, at page 292, cited the requirements of Mullane, supra, with approval and went on to say as follows:

> Wherever notice is required to be given in a judicial or administrative proceeding, due process requires that it be such notice as is reasonably calculated, under all the circumstances to enable the

interested parties to protect their rights. (Emphasis added.)

It is patently clear that Local Rule 1000 fails to comply with Mullane, supra, and Hollis, supra. Defendant simply did not receive notice reasonably calculated to enable her to protect her rights by filing a demand for trial within thirty (30) days.

What is so unfortunate in the matter is that the names and addresses of counsel were of record and all other orders (save the judgment itself) were mailed to counsel. It would be an easy matter to mail counsel a copy of the award and comply with due process requirements. Yet such procedures do not exist and defendant was denied due process. Accordingly the judgment must be set aside.

It is worth noting that the Georgia Legislature in enacting the Georgia Arbitration Code, O.C.G.A. Section 9-9-1 et seq., dealing with arbitration required by written agreement, clearly provided for adequate notice of the award of the arbitrators in the very area where Local Rule 1000 is so lacking. O.C.G.A. Section 9-9-10(a) states as follows:

> The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy of the award to each party personally or by registered or certified mail, return receipt requested, or as provided in the Agreement. (Emphasis added.)

A comparison of such Code Section with Local Rule 1000 clearly shows the

fatal deficiency of the Local Rule. The safeguards of due process contained in the notice requirements of the Code Section are completely lacking in the Local Rule. Local Rule 1000 and its application in making defendant aware of the award of the arbitrators fail to meet the requirements of due process and this Court should set aside the Judgment thus obtained against Defendant.

III.

THE JUDGMENT WAS OBTAINED WITHOUT NOTICE TO DEFENDANT

Apparently plaintiff (without giving notice of any kind to defendant or her counsel) presented the proposed judgment to the Court for its signature. Plaintiff wrongfully appeared before the Court ex parte and

communicated same to the Court without advising defendant's counsel and giving him an opportunity to be heard and present his objections thereto.

The foregoing constitutes fraud, accident or mistake or the acts of the adverse party unmixed with the negligence or fault of Defendant as contemplated by O.C.G.A. Section 9-11-60. The judgment should be set aside.

IV.

NO COPY OF THE JUDGMENT WAS SERVED ON DEFENDANT ON HER COUNSEL

The wrongfully obtained judgment was never served on defendant or her attorney as required by O.C.G.A. Section 9-11-5 thereby further depriving defendant of any opportunity to object or otherwise protect her interests.

Furthermore, as set forth in the affidavit of Thomas V. Cassidy, Esq. attached to Defendant's Motion herein as Exhibit "G", the said judgment was not even in the Court's file from at least March 7, 1989 through and including June 20, 1989, thus additionally preventing defendant from gaining knowledge of such judgment.

The foregoing constitutes fraud, accident or mistake or the acts of the adverse party unmixed with the negligence of fault of defendant.

CONCLUSION

Based on the facts and the law it is clear that defendant's Motion to Set Aside Judgment should be granted and defendant respectfully urges the Court to do so.

Respectfully submitted,

DAVID N. LEVINE, P.C

GA. BAR NO. 448400
ATTORNEY FOR DEFENDANT

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ELIZABETH JANE FASSE	)
	)
Plaintiff	)CIVIL
	)ACTION
	)FILE NO.
vs.	)D-26523
	)
PATRICIA B. HODGSON,	)
	)
Defendant.	)

JUDGMENT

The above-styled case having come on for civil arbitration pursuant to Local Rule 1000 of this Court on April 1, 1988, and an award of the arbitrators having been entered for the Defendant as to the Plaintiff's claim and for the Defendant in the amount of Five Thousand and 00/100 ($5,000.00) Dollars, attorney fees as to Defendant's Counterclaim; and it appearing that thirty (30) days have elapsed and neither party has filed a

demand for trial as required by the Local Rules of this Court.

It is hereby ordered, adjudged and decreed that Defendant have judgment against the Plaintiff as to the Plaintiff's Complaint and that the Defendant have judgment as to the Defendant's Counterclaim against the Plaintiff in the sum of Five Thousand and 00/100 ($5,000.00) Dollars, attorneys' fees, with costs against the Plaintiff.

SO ORDERED, this 6th day of June, 1988.

_____

CLARENCE COOPER,
JUDGE, SUPERIOR COURT OF FULTON COUNTY,
ATLANTA JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF FULTON COUNTY

ELIZABETH JANE FASSE	)
	)
Plaintiff	)CLERK'S
	)CASE
	) NO.
vs.	)D-26523
	)
PATRICIA B. HODGSON,	)
	)
Defendant.	)

Arbitration Case No. 87*449

OATH OF ARBITRATORS

We do solemnly swear (or affirm) that we will support, obey and defend the Constitution of the United Sates and the Constitution and laws of this State and that we will discharge the duties of our office with fidelity.

Joyce H. Pelphrey, Chairman
Jack N. Lincoln
Sonja L. Salo

AWARD

We, the undersigned arbitrators, having been duly appointed and sworn

(or affirmed), make the following award:

We find for the Defendant. All costs taxed to the Plaintiff. We award $5,000 attorneys' fees to the Defendant. We further recommend that the Plaintiff and Plaintiff's attorney be held in contempt for not appearing at Court ordered arbitration.

Date of Hearing: April 1, 1988

Date of Award: April 1, 988

Time consumed for Arbitration Hearing. 45 minutes.

notice; This Award will become the judgment of the court unless, within 30 days of the filing of this Award, a demand for trial is filed with the Court Administrator. If no such demand is timely filed, THE PREVAILING PARTY MUST PREPARE A JUDGMENT for the court

(attaching a copy of this award), and the Arbitrator's Award will become the judgment of the court.

CIVIL ARBITRATION PROGRAM
IN THE SUPERIOR COURT OF FULTON COUNTY

PATRICIA B. HODGSON,	)
	)
Plaintiff,	)
	)
	)CIVIL
vs.	)ACTION
	)FILE
SUSAN FASSE,	)NO.
	)D-14463
Defendant.	)

OATH OF ARBITRATORS

We do solemnly swear (or affirm) that we will support, obey and defend the Constitution of the United States and the Constitution and laws of this State and that we will discharge the duties of our office with fidelity.

Carol A. Levine, Chairman

Chandelle Summer

R. Michael Robinson

AWARD

We, the undersigned arbitrators, having been duly appointed and sworn (or affirmed), make the following award:

We find for plaintiff in the amount of $51,181.25 for damages and $10,795.24 in attorney's fees.

Date of hearing 2-3-89

Date of Award 2-3-89

Time consumed for Arbitration hearing. 50 minutes.

NOTICE: This Award will become the Judgment of the court unless, within 30 days of the filing of this Award, a demand for trial is filed with the Court Administrator. If no such demand is timely filed, THE PREVAILING PARTY MUST PREPARE A JUDGMENT for the court

(attaching a copy of this award), and the Arbitrator's Award will become the judgment of the court.

HOW IT WORKS

The Fulton County Superior Court Civil Arbitration Rule provides

"All civil actions filed and seeking primarily money damages of twenty-five thousand dollars ($25,000) or less, or for damages in an unstated amount, shall be required to go through compulsory but non-binding arbitration. Any part to an action not otherwise qualifying may petition the Court that the case be scheduled for arbitration when it is not for the purpose of delay, the trial judge to whom the case has been assigned may order arbitration at any time at his or her discretion on any case whether or not it otherwise qualifies for arbitration or the Court may at

its discretion, remove a case from arbitration or limit the issues to be arbitrated: all cases alleging malpractice against health care providers shall be excluded form arbitration unless requested by a party or ordered by the Court."

When your case is filed it will be scheduled for arbitration on a day and time certain, normally on the first Friday 180 days after filing.

On the hearing day attorneys, parties and witnesses will appear at the appointed time and place (the courthouse or other nearby facility provided by the Court).

At the hearing, each case will be assigned by court personnel to a panel of three lawyer arbitrators who will have been impaneled that day. One of

the three will have been designated the Chief Arbitrator and will preside.

The rules provide for a less formal hearing where the rules of evidence are relaxed, as in TRO hearings. Cumulative witnesses and evidence will be discouraged. After the hearing, the arbitrators will confer and promptly make their written award which will become the final judgment of the Court unless a trial is demanded.

A party not satisfied with the award may, within 30 days of the arbitrator's hearing, seek to further negotiate a settlement with the other parties, or file a demand for trial de novo substantially as follows:

IN THE SUPERIOR COURT
OF FULTON COUNTY
STATE OF GEORGIA

Mary Contrary	)	
	)	Civil Action
Plaintiffs	)	No. D-00000
	)	
vs.	)	
	)	
John Doe	)	
	)	
Defendants.	)	

DEMAND FOR TRIAL DE NOVO

This action having come on for a hearing on April 24, 1987 before an arbitration panel, and an award having been returned, the plaintiff Mary Contrary demands a trial de novo on all issues of fact or of law which have been and will be raised in this action.

s/Name of Attorney

P.O. Box 20892
Atlanta, Georgia 30320

Any demand for trial de novo should be directed to:

The Office of the Court Administrator
Attention: Civil Arbitration Program
Fulton County Courthouse
136 Pryor Street, SW. Room 704
Atlanta, Georgia 30303

These cases will thereafter appear on the trial calendar, at their regular time and in their normal order.

For cases in which both parties are satisfied with the arbitration panel's award, the final step in the process is to submit a consent judgment substantially as follows:

IN THE SUPERIOR COURT
OF FULTON COUNTY
STATE OF GEORGIA

Mary Contrary	
	Civil Action
Plaintiffs	No. D-00000
vs.	
John Doe	
Defendants.	

CONSENT JUDGMENT

This case was arbitrated pursuant to Local Rule 1000 on June 26, 1987. The arbitrators returned an award on June 26, 1987 and no demand for trial de novo has been filed in the Office of the Court Administrator within thirty days of that award.

Now, hereafter, it is the judgment of the Court that the Defendant, John Doe, pay the Plaintiff, Mary Contrary the amount of $12,345.

s/Judge _____

Judge, Fulton County
Superior Court
Atlanta Judicial Circuit

It is the responsibility of the prevailing party to prepare and submit the consent judgment to the Court with a copy of arbitration panel's award.